TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 177.

PATRICK MORAN, PLAINTIFF IN ERROR,

vs.

JOSEPH HORSKY, Jr.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

FILED DECEMBER 27, 1899.

(17,238.)

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1 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

JOSEPH HORSKY, JR., Plaintiff,
vs.
PATRICK MORAN, Defendant. } Amended Complaint.

And now comes the plaintiff in the above-entitled cause and by leave of court first had and obtained and files this his amended complaint therein against said defendant, and for cause shows unto this hon. court:

I.

That at the dates hereinafter mentioned he became the owner and possessor of the following-described lots, pieces, or parcels of land situated in the original town site of the city of Helena, in the county of Lewis and Clarke and Territory, now State, of Montana, to wit: Lot twenty (20), in block No. thirty-seven (37), being thirty-seven feet, more or less, on Main street and ninety feet, more or less, deep, and bounded on the south by lot No. nineteen (19), on the north by lot No. twenty-one (21), and on the west by Main street, and on the east by Jackson street, the ownership and possession of which was acquired and obtained on the 17th day of February, A. D. 1875.

2 That on the 7th day of May, A. D. 1874, he also became the owner and possessed of lot No. eighteen (18), in said block, being thirty-one (31) feet, more or less, on Main street and one hundred (100) feet, more or less, deep, bounded on the west by Main street, on the east by said Jackson street, on the north by said lot nineteen (19), and on the south by said lot No. seventeen (17); that on the date last aforesaid he also became the owner and possessed of lot No. nineteen (19), in said block, being thirty-five (35) feet, more or less, on said Main street and one hundred and three (103) feet, more or less, deep, and bounded on the north by said lot No. twenty (20), on the south by said lot No. eighteen (18), on the west by said Main street, and on the east by said Jackson street; that at said last-named date he also became the owner and possessed of a fractional piece of ground, should the same be so regarded, situate between said lots Nos. nineteen (19) and twenty (20), in said block, containing twenty-one (21) and $\frac{5}{10}$ feet, more or less, on said Main street and extending back to said Jackson street; and that also on the 6th day of May, A. D. 1874, the said plaintiff became the owner and possessed of lot No. seventeen (17), in said block, being thirty-four (34) feet, more or less, upon said Main street and one hundred and seven (107) feet, more or less, deep, and bounded on the south by lot No. sixteen (16), on the north by lot No. eighteen (18),

3 on the west by said Main street, and on the east by said Jackson street.

That in truth and reality the said lots owned and possessed

by plaintiff and his predecessors in interest composed one hundred and sixty-one feet fronting on said Main street and running back to said Jackson street, according to the original established and recognized boundaries of said lots; that, according to an accurate measurement thereof, the said lots exceeded the number of feet designated in the deeds therefor by M. F. Truett, then probate judge of the county aforesaid, twenty-one and $\frac{5}{100}$ feet, but that, according to the said lots and boundaries thereof, according to the calls in the deeds from said Truett as such probate judge, no excess whatever existed, and that the title and possession of plaintiff and his predecessors in interest was acquired and obtained accordingly, and on account whereof the said lots, pieces, or parcels of land and the dimensions thereof were governed and controlled by the said boundary lines so established and recognized by plaintiff and his predecessors in interest.

II.

That immediately upon becoming so the owner of the said lots, pieces, or parcels of land, this plaintiff went into the possession of said one hundred and sixty-one feet of ground fronting upon said Main street and running back to said Jackson street, and
4 ever since claiming under him and his tenants and agents have been in possession of the same.

That since and long prior to the said year 1875 said premises have been enclosed by a good and substantial fence and houses erected thereon, and continuously actually occupied and possessed, as aforesaid; that the lots, piece, or parcel of land described in the deed hereinafter mentioned to said defendant and claimed by him is inside of the enclosure of plaintiff and is part and portion thereof, so enclosed since 1874; that said defendant and no other person except those claiming under plaintiff and this plaintiff have been in the seizure or possession of any part of the said one hundred and sixty feet of ground so enclosed, as aforesaid; that for more than five years, continuously and uninterruptedly, prior to the obtaining by defendant of the deed hereinafter mentioned and the institution of this action, this plaintiff and his tenants and those claiming under him have had said premises and that portion thereof so deeded and claimed by plaintiff in actual possession by means of substantial fences and inclosures and the actual occupation and use thereof; all of which has been open, hostile, and notorious, and possession taken under the deeds of the predecessors in interest of this plaintiff.

III.

That on the 20th day of August, A. D. 1873, Robert S. Hamilton, one of the grantors of this plaintiff, being then in the actual
5 possession and occupation of said lots Nos. nineteen (19) and eighteen (18), in the block aforesaid, by inclosures thereof by a substantial fence, according to the established and recognized boundaries thereof, finding that the same by actual measurement exceeded the number of feet called for in the deeds therefor, and for

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the purpose of avoiding trouble or contention concerning the same, duly made his application to the probate judge for entry of the said excess of ground according to actual measurement for the entry of and deed for the said portion of lots nineteen and eighteen (19 & 18) so designated as a fraction, as aforesaid; that the same was done while the said Robert S. Hamilton was so in possession and actual occupation of said lots; that at the time of the said application the said Robert S. Hamilton offered to pay and tendered to said probate judge his fees and the maximum price of said fraction, on account whereof he became and was in equity and good conscience the owner of and entitled to a deed to said premises or fraction if any there be, and all of which was done for the purpose aforesaid and without any intention of abandoning his title according to the established and recognized boundaries of said lots Nos. nineteen and eighteen (19 & 18); that this plaintiff, being the grantee of said Robert S. Hamilton and succeeding to all of his rights and equities in the premises, on the 15th day of December, A. D. 1888,
6 petitioned said probate judge to convey to this plaintiff the said alleged fractional lot so applied for by said Hamilton, and in pursuance of said petition and the application of his grantor, as aforesaid, said probate judge, on the date aforesaid and while plaintiff was so in the possession and occupation of said premises as such grantee, made, executed, and delivered to plaintiff a deed for said premises.

IV.

And plaintiff further shows unto this hon. court that notwithstanding the said ownership and actual possession by him had and held of said lots Nos. 17, 18, 19, and 20, and the alleged fractional portion thereof, the said defendant made his petition and application for a portion thereof so in plaintiff's enclosure, as aforesaid, and by his false and fraudulent representations in reference thereto obtained from said probate judge a deed for a certain lot, piece, or parcel of land so embraced in said enclosure, to wit, said alleged lot No. thirty-one (31), in block thirty-seven (37), of the Helena town site, according to the official survey thereof, approved September 12th, 1885; that said deed is executed in due form of law, and has been ever since its execution and now is of record in the office of the county clerk and recorder of the said county of Lewis and Clarke and State of Montana, and casts a cloud upon the title of plaintiff, greatly to his damage and injury.

7 Wherefore plaintiff prays:

1st. That the said deed so executed by the said probate judge to the said defendant be declared and decreed to be void and of no effect.

2nd. That the right and title, legal and equitable, of this plaintiff in and to the premises aforesaid be adjudged and decreed to be valid.

3rd. That he have such other or further relief as in equity and

good conscience he may seem entitled to, and that he recover his costs and disbursements in this behalf expended.

TOOLE & WALLACE,
Attorneys for Plaintiff.

TERRITORY OF MONTANA, }
County of Lewis and Clarke, } ss:

Joseph Horsky, Jr., makes oath and says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge save and except the matters and things therein stated upon information and belief, and as to such matters and things he believes it to be true.

JOSEPH HORSKY, JR.

Subscribed and sworn to before me this 30th day of December, A. D. 1890.

J. MILLER SMITH,
[SEAL.] *Notary Public.*

8 (Title of Court.)

(Title of Cause.)

Now comes the defendant, and for answer to the amended complaint herein on information and belief denies that the several lots mentioned in said amended complaint as lots Nos. seventeen (17), eighteen (18), nineteen (19), twenty (20), and twenty-one (21), in block thirty seven (37), of the original town site of Helena, the ownership of which said lots 17, 18, 19, and 20 is by said amended complaint alleged to be in the plaintiff herein, as the same existed and were platted by and shown upon the original plat of the town site of Helena at the dates, to wit, 1874 and 1875, set forth as the dates upon which plaintiff acquired his title, or for more than ten years thereafter, occupied the same position on the earth's surface as the position of the same-named lots and block did at the date of the commencement of this suit and as they do now occupy; also on information and belief denies that prior to September 12th, 1885, the position of the bounding streets named in said complaint, to wit, Jackson street and Main street, *were*, according to any official survey or plat of the said town site, in the same position on the earth's surface as they have been since September 12th, 1885.

9 Denies the allegation, to wit, that said defendant or any person except those claiming under plaintiff or said plaintiff have since 1874 been in the seizure or possession of any part of the 160 feet "of ground mentioned in said complaint as being enclosed."

Admits that the land occupied by said plaintiff herein had been so occupied by plaintiff for a period of more than five years prior to the commencement of this action; but denies that such occupation, in so far as it relates to lot 31, block 37, was open, hostile, or notorious, or was adverse or could be adverse, and denies that pos-

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session thereof was taken under the deeds of the predecessor in interest of the said plaintiff or in any other manner than in subordination to the legal title of said land, which defendant alleges was and remained in the probate judge, in trust for this defendant and none other, until the 11th day of December, 1888; and denies that said land had ever, prior to said September 12th, 1885, been officially platted, known, and designated as lots seventeen (17), eighteen (18), nineteen (19), and twenty (20), and denies that there was, prior to said September 12th, 1885, any space, lot, piece, or parcel or fraction of land lying or existing between lots nineteen (19) and twenty (20) of block No. thirty-seven (37) or between either two of any of said lots numbered seventeen (17) to twenty-one (21), and on the contrary alleges that prior to the said September 12th,
10 1885, according to the official plat of said town site then existing, the said named lots, to wit, nineteen (19) and twenty (20), were adjoining lots and consisted of no more nor no less than the number of feet frontage as shown on said official plat then existing or then expressed in deeds to the predecessors in interest of said plaintiff.

Denies that in truth or in reality or in any other manner the lots mentioned in said amended complaint as numbers 17, 18, 19, and 20, as being owned by the plaintiff herein, composed or included one hundred and sixty-one feet fronting on Main street and running back to Jackson street, according to the original and established and recognized boundaries, and denies that according to an accurate measurement the said lots exceeded the number of feet designated in the deeds therefor by M. F. Truett, the probate judge of the county aforesaid, twenty-one and $\frac{5}{100}$ feet or any other number of feet.

Admits that according to the calls in said deeds from said Truett, as such probate judge, no excess whatever existed, and admits that the title of plaintiff and his predecessors in interest was acquired and obtained accordingly, but denies that possession was taken accordingly, and denies that on account thereof or on any other account, as a question of law or as a question of fact, the said lots, pieces, or parcels of land or the dimensions thereof were governed or controlled by any acts of plaintiff or his predecessors or by
11 any other thing than the then existing plat and the identical portion of the earth's surface, as shown and delineated thereon and as expressed in the said deeds of which said plat constituted a necessary part, said plat being the original official plat known as the Wheaton plat, which was approved January 7th, 1869, and now on file in the office of the county recorder of Lewis and Clarke county, State of Montana.

Denies that Robert S. Hamilton did, on the 20th day of August, 1873, or at any other time, tender or offer to pay to the probate judge his fees or maximum price for any fraction, for the reason as hereinbefore stated, to wit, that there was no fraction existing under or according to any existing plat or survey; and denies that any such offer or tender for a thing not *in esse* would constitute the said Hamilton or his successors, either in law, equity, or good con

science, or in any other manner, *to be* the owner of or entitle him or them or the plaintiff herein to a deed for any premises at all.

Defendant alleges that at the date of the entry of said town site, March 2, 1869, being the date when the probate judge made entry of said town site in the United States land office at Helena, Montana, in trust for the several use and benefit of the occupants, he, the said defendant, was and for a long time prior thereto had been and for a long time subsequent thereto had remained in the actual *bona fide* and sole occupation, possession, and enjoyment, and re-
12 siding upon a certain tract of land within the town site of Helena, as so entered by said probate judge, and that a portion of the said tract of land so occupied by this defendant was and is the same, and then included and now includes the whole of the identical tract of land described in defendant's deed therefor as lot No. thirty-one (31) of block No. thirty-seven (37) of the town site of Helena, according to the official plat and survey of said town site of Helena, as approved September 12th, 1885.

Alleges that prior to the approval of said official plat, to wit, September 12th, 1885, there was no official plat in existence which showed the land occupied by this defendant at the date of the entry of said town site and as described in defendant's deed therefor in such manner and form as that this defendant could by any possibility make an application therefor as one of the beneficiaries of the trust imposed on the probate judge by reason of the entry and patent from the United States for said town site, and alleges that from and after the approval of said official plat, to wit, September 12th, 1885, until the time when this action was commenced, no notice of the approval of said plat or that said land was and had been platted and surveyed, so that a deed for said lot could be issued, was published or in any other manner given, as required by section 2015 of the Compiled Statutes of Montana; and defendant alleges that prior to said September 12th, 1885, the only plat in existence of said town site was one con-
13 structed by A. C. Wheaton, in 1868, and approved by the county commissioners of Lewis and Clarke county, Montana, January 7, 1869, the same having been constructed and approved prior to the entry of said town site, and which said so-called plat, not having been made in accordance with the actual occupation of claimants, occupants, and owners, represented Main street and Jackson street, being the bounding streets of the land in dispute herein, as running at a different angle to the exterior boundaries of said town site and in a different position on the earth's surface from the position of said streets as governed by actual occupancy, as such occupancy is shown by the said official plat approved September 12, 1885, whereby and by reason whereof the land claimed by plaintiff herein, under the title and description recited in said amended complaint, if anywhere, is not the same land or portion of the earth's surface as that of which the defendant is the owner by reason of his deed dated December 11th, 1888.

Defendant further alleges that at the date of the entry of said town site by the probate judge of said Lewis and Clarke county he,

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the said defendant, had a dwelling-house upon, was living therein, and solely and exclusively occupying the land described in his said deed as lot number thirty-one (31) of block No. thirty-seven
14 (37), according to the said official plat approved September 12th, 1885, and never since has he alienated the title thereto to any person or persons whomsoever, and that he is now the owner and entitled to the possession thereof.

And further alleges that between the date of the entry of said town site until the said 11th day of December, 1888, the title of said lot number thirty-one (31), block thirty-seven (37), being the land in dispute herein, remained in the probate judge of said Lewis and Clarke county under and by virtue of the trust imposed on him by reason of the patent from the United States for said town site.

Defendant admits that on the 15th day of December, 1888, the probate judge of Lewis and Clarke county, Montana, did issue an instrument in writing purporting to be a deed executed in due form of law to the plaintiff herein for lot number thirty-one (31), in block thirty-seven (37), according to the plat and survey approved September 12th, 1885, but denies that said deed was for that portion of the earth's surface described in said amended complaint as being a fraction of or part of the original lots 17, 18, 19, and 20, in block 37, or either of said lots, according to or as the same was delineated on any plat or as shown by any survey existing prior to September 12th, 1885, and which is now or ever was recognized or approved as an official survey or official plat and made under any authority of law, but, on the contrary, alleges that said purported deed
15 is for and purports to convey unto plaintiff herein the said lot number thirty-one, the property of this defendant, and defendant alleges that said deed, issued and executed in due form of law December 15, 1888, unto the plaintiff herein, was wrongfully and unlawfully issued, the title of said lot at that date being and still remaining rightfully and lawfully in this defendant, and the same casts a cloud upon the defendant's title to the said lot number thirty-one (31) of block thirty-seven (37) of said Helena town site.

Defendant denies that by reason of any false or fraudulent statement or representation made to the probate judge or to any other person he obtained a deed for said lot thirty-one (31), but, on the contrary, alleges that all statements, affidavits, and proofs made to said probate judge by this defendant and by his witnesses in making application therefor were truthful and strictly in accordance with facts, and that said deed to this defendant was issued rightfully and lawfully and in strict conformity to the authority conferred by law upon and according to the requirement of the trust imposed upon the said probate judge by act of Congress authorizing the grant of said town site and by the terms of the patent of the United States issued to him for that sole purpose, and denies that the said deed casts a cloud upon the title of plaintiff or of any other person, to his damage or injury, greatly or otherwise.

16 And defendant, for further defense, says that said plaintiff is estopped from claiming that he has held the said lot number thirty-one (31) adversely to this defendant or adversely to the

true legal title, because he says that on the said 15th day of December, 1888, the said plaintiff did apply to and receive from the said probate judge of Lewis and Clarke county aforesaid the deed hereinbefore mentioned for said lot, and ever since has been and still claims to hold the same under and by virtue of said deed.

Wherefore defendant herein prays judgment and decree of this honorable court:

First. That the deed to said plaintiff, dated December 15th, 1888, from the probate judge is unavailable, void, and of no effect.

Second. That the deed to said defendant from the probate judge, dated December 11th, 1888, is valid and in full force, and conveys the title and right of possession unto said defendant.

Third. That the possession of said plaintiff of the premises in dispute herein, to wit, lot No. 31 of block No. 37, Helena town site, was, is, and always has been in subordination to the legal title and not hostile or adverse thereto.

Fourth. That the defendant herein was at the date of his deed for said lot No. 31 of block 37 of said Helena town site and
17 ever since has been entitled to the possession of the said premises as described in said deed.

Fifth. That the plaintiff herein is estopped from denying that the seizure and fee of the land in dispute herein remained in the hands of the said probate judge, in trust for the use and benefit of the occupant at date of entry of said town site, until a survey of said premises had been made and approved and notice thereof given in accordance with law, and that no occupation or possession of plaintiff or his tenants or predecessors in interest could be hostile or adverse to the rights of defendant herein under the terms of the trust imposed by the patent from the United States to the probate judge.

Sixth. That the defendant herein have judgment for the possession of said premises, for the rents, issues, and profits thereof, for his costs of suit in this behalf expended, and for such other and further relief as may be agreeable to equity and good conscience.

CULLEN, SANDERS AND SHELTON AND
COMLY AND FOOTE, *Attorneys for Defendant.*

(Duly verified.)
(Filed January 7th, 1891.)

18 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

JOSEPH HORSKY, JR., Plaintiff,
vs.
PATRICK MORAN, Defendant.
} Amended Complaint.

And now comes the plaintiff in the above-entitled action and, in pursuance of leave of court heretofore obtained and for the purpose of complying with the decision of the supreme court of the State

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of Montana and the principles of law therein announced and declared, *and* files this his amended complaint herein and alleges:

I.

That for twenty-four years last part himself and his grantors have continuously been in the open, notorious, hostile, and adverse possession and occupation of that certain piece or parcel of land designated and claimed by defendant as lot thirty-one (31), in block thirty-seven (37), in the city of Helena, county of Lewis and Clarke, State of Montana, which entry, possession, and occupation was made, had, and held under claim of title, exclusive of any other right,
19 and under a deed of conveyance therefor, and which said lot, piece, or parcel of land hath been continuously for twenty-four years last past enclosed and protected by a substantial fence and enclosure by said plaintiff and his grantors, on account whereof any claim, right, or title said defendant had or pretended to have in and to said lot, piece, or parcel of land so had, held, possessed, and occupied by plaintiff and his grantors has become and is barred by sections 29, 30, 31, 32, 33, and 34, chap. II, first division, Code of Civil Procedure of the Compiled Statutes of the State of Montana.

II.

That on the 17th day of February, 1874, he became the purchaser and owner of that lot, piece, or parcel of land situate, lying, and being in the city of Helena and county of Lewis and Clarke and State of Montana and designated and known as lot 20, in block 37, of the original town site of the city of Helena, the same being thirty-seven feet, more or less, on Main street and ninety-five feet deep, more or less, and bounded on the south by lot 19, and on the north by lot 21, and on the west by Main street, and on the east by Jackson street; that also on the 7th day of May, 1874, he became the owner and purchaser of lot 18, in block 37, being 31 feet, more or less, on Main street and one hundred feet deep, bounded on the west
20 by said Main street, on the south by lot 17, on the east by said Jackson street, and on the north by lot No. 19; also said lot No. 19, in said block 37, being thirty-five feet, more or less, fronting on Main street and one hundred and three feet deep, and bounded on the north by lot 20, in said block, on the east by Jackson street, on the south by lot No. 18, in said block, and on the west by said Main street; and also on the said 7th day of May, 1874, he became the owner and purchaser of a fractional lot or piece of ground situated between lots 19 and 20, in said block 37, containing two and five-tenths feet, more or less, on Main street and extending back to Jackson street; and also that on the 6th day of May, 1874, he became the purchaser and owner of lot No. 17, in block 37, being thirty-four feet, more or less, on Main street and one hundred and seven feet deep. All of such lots so appeared to be of such width according to the official plats made by M. N. Truett, probate judge, and filed in the county recorder's office of Lewis and Clarke county, Montana Territory; all of which said four lots being entered ac-

cording to the original location and boundary thereof and *was* actually occupied by the grantors and predecessors in interest of this plaintiff, comprising about one hundred and sixty-one feet instead of one hundred and thirty-seven feet as designated by the calls in said deeds and by the said official plat.

21 This plaintiff avers that by reason thereof and the boundaries so defined, as aforesaid, that the lots were governed and controlled by the boundary lines thereof, and not by the number of feet in accordance with the call in said deeds and the said plats; all of which said boundary lines were well established, recognized, and known by the grantors and predecessors in interest of this plaintiff.

III.

That immediately upon becoming so the owner of the aforesaid premises, this plaintiff entered into the actual occupation, possession, and enjoyment thereof, all of which at said dates were respectively enclosed by permanent fences and hath ever since and now are enclosed and occupied by buildings and other improvements thereon by this plaintiff and his tenants (*and that said probate judge obtained a patent for said town site, including the premises in controversy, on the 15th day of June, A. D.* 1872). (N. B.—The foregoing portion of the amended complaint underscored was inserted by interlineation by leave of the court after the cause was argued and set forth in the bill of exceptions.)

IV.

Plaintiff further shows unto this honorable court:

That his grantor, Robert S. Hamilton, being then and at the time owner of and in the actual possession and enjoyment by substantial enclosures of lots 19 and 20, in said block 37, and

22 for the purpose of avoiding any controversy which might arise on account of the dimensions of the property so occupied, possessed, and owned by him by reason of the calls designating the number of feet thereof in said deed, did on the 20th day of August, 1873, duly make his application to the probate judge of the said county for the entry of such portions of the said lots 19 and 20 as exceeded the calls in said deed, to wit, twenty-two feet front on Main street, more or less, and one hundred and three feet deep, and did pay to the probate judge the sum of fourteen dollars, being the amount of his fees and the price of said lot, for the purpose of obtaining and procuring a deed therefor; that he then and there, on account of said application and payment, became the owner of and was entitled to a deed for the said twenty-two feet, more or less, of ground aforesaid, comprising the entire fraction, if any, between the said lots.

V.

That this plaintiff, being the grantee of said Robert S. Hamilton and successor in interest to him and to all his rights and equities in and to said twenty-two feet fraction of said lots in said block, did on the 15th day of December, 1888, petition the probate judge of the

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said county of Lewis and Clarke and Territory of Montana for the conveyance to him of the said fractional lot, piece, or parcel of land
to which his said grantor was entitled, as aforesaid, and that
23 in pursuance of his said petition and application of his said predecessor in interest and the conveyance thereof to this plaintiff the probate judge did on the date aforesaid execute and deliver to this plaintiff a deed therefor.

That no other person or persons whomsoever, except this plaintiff, have been in the possession of the said property for the last fourteen years, nor has any one to the knowledge or information of this plaintiff claimed any right whatever to the same, except as hereinafter stated.

VI.

Plaintiff further shows unto this honorable court:

That the said defendant, Patrick Moran, without any right, title, or claim in law or equity to the said premises, made his application to the said probate judge on the 11 day of December, 1888, for a deed to said premises while so being owned, occupied, and possessed by this plaintiff, and by reason of his false and fraudulent representations in reference thereto obtained and procured from the said probate judge a deed for the said fractional piece or parcel of land so comprising a part of said lots 19 and 20, as hereinbefore set forth.

That the said deed was executed in due form of law and has been recorded in the office of the county recorder of said county, and casts a cloud upon the title of this plaintiff, greatly to his damage and injury.

24 Wherefore plaintiff prays:

1. That the said deed so executed by the probate judge to the said defendant be declared and decreed to be null and void and of no effect.

2. That the right and title, legal and equitable, of the plaintiff in and to the premises aforesaid be adjudged and decreed to be valid.

3. That he have such other or further relief as in equity and good conscience he may seem entitled, and that he recover his costs and disbursements in this behalf expended.

TOOLE AND WALLACE,
Attorneys for Plaintiff.

(Verified.)
Filed Sept. 22, 1894.

25 *Answer.*

(Name of Court.)

(Title of Cause.)

The defendant above named for an amended answer herein:

I. Denies that the plaintiff herein is the owner or possessor of the premises described in the amended complaint, or any of them, or any part of them, or that his alleged predecessors in interest were

or could be the owners of any portion of said premises, but admits that he and they have occupied them as alleged in said complaint, but denies that he ever acquired either the ownership or the possession of the said premises or any part of them; and denies that the plaintiff or his predecessors in interest as to any portion of the said premises have been in the seizure of the said premises, or have been seized of the same or any part thereof; and defendant denies that any of the predecessors in interest of the said plaintiff have ever been the owners or have been in possession or have been in the seizure of or have been seized of any portion of the said premises; and denies that defendant's title to any portion of the said premises is barred by any provisions of the Code of Civil Procedure or otherwise.

26 II. And defendant alleges the truth to be with reference to the ownership of the said premises as follows: That on the 2nd day of March, 1869, the probate judge of the county of Lewis and Clarke, State of Montana, made an entry of certain tracts of land in trust for the use and benefit of the occupants thereof under and by virtue of the laws of the United States in reference to the entry of town sites, which said tracts so entered embraces within their exterior limits the mining claim of the defendant hereinafter described.

That, prior to the entry of the said town site by the said probate judge, certain citizens of the United States had, pursuant to the laws of the United States and local laws and customs of miners and pursuant to the rules, regulations, and laws of the mining districts in which the same was situated, located as a placer mining claim certain ground within the exterior limits of the tracts so entered by the said probate judge, embracing within its limits all of the ground claimed by the plaintiff in his complaint herein, and of which he alleges that he is the owner; that the said ground so located contained at the time it was so located and at the time of the said entry and still contains valuable deposits of gold, and that the said locators, in locating the same, marked its boundaries by substantial

27 monuments, so that the said boundaries could be readily traced, which was all that was required by the said laws, regulations, rules, and customs to entitle the said locators to the possession of the same, and, upon the performance thereon of the amount of development work by law required, to a patent to the same from the United States.

That upon the location of the said ground, as aforesaid, the same being then a portion of the unappropriated domain of the United States public land, the said locators went into the possession of the same and began the extraction of gold therein, and so continued in the possession of the same and in the work of extracting the gold therefrom, and so the successors in interest of the said locators continued to do, pursuant to the laws, regulations, and customs and rules, until by mesne conveyances and under and pursuant to the said laws, regulations, rules, and customs the defendant herein, then and at all times since a citizen of the United States, became the owner of the interest of the locators in all of the ground so

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located prior to the time of the entry of the said town site by the said probate judge and still is the owner thereof.

That immediately upon the defendant's so becoming the owner of the said ground and mining claim he went into the possession of the same and began extracting the gold therefrom, and so remained in the possession of the same and continued from then on and until long after the entry of the said town site in the
28 work of extracting the gold therefrom; and the said defendant avers that at the time of the said entry of the said town site he had a valid and subsisting mining claim to all of the ground so located, embracing all of the premises claimed by the plaintiff in his complaint, which said ground was then a mine of gold, by reason whereof the title to the same remained in the United States subject to the right of the defendant herein to acquire patent thereto agreeably to the laws of the United States, and so still remains.

That after the entry of the said town site and prior to the time alleged in the complaint as the time when the said plaintiff became the owner of the premises claimed therein the said defendant left the State of Montana, leaving the said mining claim in the possession of his agent; that during the absence of the said defendant, as he is informed and believes, the said plaintiff, without any right or color of right and without any attempt or intent to acquire title to the said premises or any portion of them under any of the laws of the United States pursuant to which they might be entered, entered upon and has since continued to occupy so much of the said mining claim as he claims in the complaint herein, and in like manner did other parties enter upon the remainder of the said mining claim, who continue to hold and occupy the same and exclude the defendant from the possession of the same, as does the plaintiff herein as to that portion of the said mining claim claimed by him in his complaint herein.

29 And defendant avers that under and pursuant to the laws of the United States and the said rules, regulations, and customs he is required, under penalty of the forfeiture of his rights in the said mining claim to any person relocating the same, and to preserve his rights therein and to enable him to obtain patent therefor, to do certain development work upon said claim; but the said plaintiff and the said other parties holding and occupying the same refuse to permit the plaintiff to enter upon the same for the purpose of doing such work, and that any attempt upon the part of the defendant to enter upon the same for the purpose of doing the said work would subject him to a summary action of forcible entry and to personal violence, though defendant is and always has been desirous of doing such work and acquiring patent to the said mining claim.

III.

And the defendant further avers that on the 11th day of December, 1888, no deed of the same having ever been issued by the probate judge of Lewis and Clarke county, for the purpose of further assuring the title of the defendant thereto, and to enable him to get

into possession of a portion of the said claim in order to prosecute the necessary development work thereon, he applied to the said probate judge for a deed to lot thirty-one (31), in block thirty-seven (37), of the city of Helena, as the same is laid down on the official plat of the city, approved September 12, 1885; that, having made the proofs required, a deed was executed and delivered to him by the said probate judge, but that the said plaintiff refused to recognize his right to the possession of the premises described therein or to allow him to enter into the possession of the same, and defendant denies that he obtained the said deed by reason of any false or fraudulent statement or representation to the said probate judge or to any person, but, on the contrary, alleges that all statements, affidavits, and proofs made to the said probate judge by the defendant herein and by his witnesses in making application therefor were truthful and in accordance with the facts, and defendant avers that at the date of the entry of the said town site by the said probate judge he, the said defendant, had a dwelling-house thereon, was living therein, and solely and exclusively occupying the land described in said deed.

Wherefore defendant prays judgment that the complaint of the plaintiff be dismissed on its merits; that the defendant be decreed to be entitled to the possession of the premises described in the complaint, and that he be put into possession of the same; that plaintiff and all persons claiming under or through him be enjoined from in any manner interfering with the work of extracting any gold therefrom or doing any development work thereon; that defendant have such other and further relief, including judgment for his costs herein, as to the court may seem just.

SANDERS & SANDERS,
GEO. B. FOOTE, AND
T. J. WALSH,
Defendant's Attorneys.

(Verified.)
Filed October 4, 1894.

Motion for Judgment on Pleadings.

(Name of Court.)

(Title of Cause.)

Now comes the plaintiff in the above-entitled action and moves the court for judgment upon the pleadings herein for the reason:

1. That the answer of the said defendant constitutes no valid defence to the cause of action set up in plaintiff's complaint.

2. For the reason that the said defendant's claim to the premises herein is barred by sections 29, 30, and 33 of the Code of Civil Procedure, Compiled Statutes of the State of Montana.

TOOLE & WALLACE,
Attorneys for Plaintiff.

(Filed Oct. 9, 1894.)

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Amended Motion for Judgment on Pleadings.

(Name of Court.)

(Title of Cause.)

Now comes the plaintiff in the above-entitled action and files this his amended motion for judgment on the pleadings, and moves the court for judgment herein on the pleadings heretofore filed in this cause, the remittitur from the supreme court therein, and upon the amended complaint and answer filed herein, re-
32 spectively, for the reason that the said answer is sham and frivolous and constitutes no defense to the cause of action set out in the plaintiff's complaint, and for the reason that the same is barred on account of the laches of said defendant as shown by the papers and proceedings aforesaid.

TOOLE & WALLACE,
Attorneys for Plaintiff.

(Filed Dec. 22, 1894.)

Decree of Court.

(Name of Court.)

(Title of Cause.)

Be it remembered that on the 31st day of December, A. D. 1894, plaintiff's motion for judgment on the pleadings herein coming on to be heard, and the same having been argued by counsel for plaintiff and defendant, and having been duly considered by the court, was on the second day of March, A. D. 1895, sustained, and it was thereupon ordered that the plaintiff have judgment in accordance with the said motion.

Now, therefore, in consideration of the premises, it is ordered, adjudged, and decreed, and the said plaintiff, Joseph Horsky, Jr, is hereby declared and adjudged to be the owner of the premises described in his said complaint and involved in this controversy, and that the said defendant's claim or pretended claim thereto be,
33 and the same hereby is, declared to be void and without right or equity, and that the said deed for said premises from the probate judge of said county, mentioned and described in said complaint, is a cloud upon the title of said plaintiff to said premises, and is embarrassing and injurious to him on that account, and it is therefore ordered, adjudged, and decreed that the said deed be, and the same is hereby, cancelled and made null and void, and that the said title of the said plaintiff to said premises be adjudged and declared to be valid and effectual.

It is further considered and adjudged that the plaintiff recover of the said defendant his costs and disbursements in this behalf expended, taxed herein at the sum of two and $\frac{50}{100}$ dollars.

Done in open court this 19th day of June, A. D. 1895.

HORACE R. BUCK,
Judge of said Court.

(Filed June 19, 1895.)

34 *Bill of Exceptions.*

(Name of Court.)

(Title of Cause.)

Be it remembered that among the records and proceedings had and done in the above-entitled action were the following, to wit:

On the — day of ——, 18—, plaintiff filed his complaint in this action, which is in words and figures following, to wit:

(Here insert complaint.)

(The above complaint will be found in the transcript on appeal in this cause heretofore made and filed in the supreme court of the State of Montana, pages 1 to 9, inclusive, by this reference made a part of this transcript.)

That thereafter and on the — day of ——, 18—, defendant filed his answer to said complaint, which is in the words and figures following, to wit:

(Here insert answer.)

(The above answer will be found in the transcript on appeal in this cause heretofore made and filed in the supreme court of the State of Montana, pages 12 to 22, inclusive, by this reference made a part of this transcript.)

That on the — day of ——, 18—, plaintiff filed his replication, which is in words and figures following, to wit:

(Here insert replication.)

35 That upon the issues so framed the said cause came on for trial, and judgment was rendered in favor of the plaintiff on the — day of ——, 18—, from which judgment an appeal was taken and perfected, and on the 5th day of September, 1894, by a decision of the supreme court of the State of Montana, said cause was reversed and remanded, and that thereafter and in accordance with the decision so as aforesaid made said plaintiff filed his amended complaint herein, which is as follows, to wit:

(Here insert amended complaint.)

(Amended complaint hereinbefore set out.)

And thereafter and on the — day of ——, 1894, said defendant filed his amended answer herein, which is in the words and figures following, to wit:

(Here insert amended answer.)

That thereupon and on the — day of ——, 1895, the said plaintiff moved for judgment on the pleadings as thus presented, which

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said motion for judgment is in the words and figures following, to wit:

(Here insert motion for judgment.)

That elaborate arguments and briefs were made in said cause upon the basis that a United States patent had been issued to the probate judge of the said county of Lewis and Clarke, and said cause was submitted upon that theory.

36 While the motion for judgment was under advisement by the court after argument, the court called the attention of counsel to the fact that there was no direct allegation in any of the pleadings to the effect that patent for the town site had been issued to the probate judge of Lewis and Clarke county; thereupon it was agreed between the judge and respective counsel, in open court, that it might be considered that the pleadings so alleged and that the amendment might be made at any time.

And the court, having considered the said questions aforesaid, on the 2nd day of March, 1895, filed its written opinion herein, which is in words and figures as follows, to wit:

(Here insert opinion of court.)

On or about March 28th, 1895, no amendment of the complaint having been made and the defendant being desirous of completing the record, counsel for the defendant, in the presence of counsel for the plaintiff, called the attention of the court to the fact that no amendment had been made, whereupon the counsel for the plaintiff stated that he did not care to make any amendment, as he deemed the complaint sufficiently averred the issuance of a patent to the probate judge, but said counsel had previously notified the judge of the court that he would amend if the judge desired him to. Thereafter counsel for the defendant asked leave to amend his answer.

(Here insert amendment asked for.)

37 The amendment referred to — as follows: And defendant avers that the said plaintiff and each and all of the said persons so entered the said premises and now hold and at all times have held the same under and by virtue of deeds from the probate judge of the county of Lewis and Clarke, issued by the said probate judge of the said county upon his entry and pursuant to the laws of the United States in relation to the preservation and sale of town sites on the public lands, each of which deeds contained the following clause, to wit: "This conveyance is made subject to the *bona fide* rights of miners possessed of mining ground within the limits above named (the premises granted by such deed) on the 26th day of February, 1869."

To this counsel for the plaintiff said he would examine the deeds referred to in the proposed amended answer, and he probably would not oppose the motion; afterwards, however, he signified his dissent, basing it upon the ground that the defendant sought to introduce a

new defense. But no amendment of the complaint having been made meanwhile, the defendant, on the 4th day of April, 1895, filed a motion for a re-argument of the motion for judgment, in answer to which the plaintiff filed the following affidavit, to wit, the affidavit hereto attached marked Exhibit B; that no amendment of the complaint having been made on the 4th day of May, 1895, counsel for the defendant asked the court to fix a day on or
38 before which the plaintiff should amend his complaint, or elect not to — so; whereupon the court fixed Saturday, the 11th day of May, 1895, notifying counsel for plaintiff that the court desired the amendment made pursuant to the stipulation entered into. On said last-mentioned day the plaintiff amended his complaint by interlining the following, to wit: "And that said probate judge obtained a United States patent for said town site, including the premises in controversy, on the 15th day of June, A. D. 1872," the court directing that the amendment be considered as made *nunc pro tunc*, pursuant to agreement. Thereupon the defendant renewed his motion for leave to amend his answer, hereto annexed, marked Exhibit A, previously referred to. This motion of defendant was denied, the court assigning as a reason that the case had been tried upon two different theories already, and to allow the amendment would be virtually to try it a third time. Whereupon the defendant excepted, and now this bill of exceptions is by me, the judge of said court, after notice, settled and allowed, the same being true and correct.

June 4th, 1895.

HORACE R. BUCK, *Judge.*

(Filed June 4th, 1895.)

39 EXHIBIT A.

(Name of Court.)

(Title of Cause.)

(The proposed amended answer is identical with the answer first herein set out, with the addition of the amendment asked to be made by defendant, above set out.)

EXHIBIT B.

(Name of Court.)

(Title of Cause.)

In the Matter of the Application for a Re-argument of the Question Determined by the Court.

STATE OF MONTANA, *County of Lewis and Clarke,* } *ss.:*

Edwin W. Toole, being duly sworn, says that he is one of the attorneys for the plaintiff in the above-entitled action, and has had the exclusive control and management of the same as such attorney;

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that the argument had upon the motion for judgment therein was based upon the theory that the — States patent had issued to the probate judge of the county of Lewis and Clarke for the premises in controversy, and that — allegations of entry in connection with the averments made in the answer were sufficient for the purpose; that the entire argument and briefs in the case were based upon this theory, and that upon the suggestion that possibly it
40 might be better that a direct averment should be made in the complaint showing the date and issuance of the United States patent to said probate judge the said parties took leave to amend—that is to say, the plaintiff took leave to amend his complaint by making said averment by interlineation, and the said defendant took leave to amend his answer by inserting said patent, so that no question would remain as to the present action of the propositions argued and upon which briefs were submitted to the court; that on the 31st ult. Mr. T. J. Walsh, attorney for defendant, was in the office of this affiant, and in talking over the amendments proposed affiant understood said attorney to allude to the proposed amendment he had given to him a few days ago which did not come within the leave heretofore granted, nor had any application whatever thereto, and it was in this connection affiant said that he did not propose to amend, but did suggest that he was willing to make the amendments heretofore granted by the court, but that under no circumstances would he make any such amendments as would allow him to raise the question of the statute of limitations. In connection herewith affiant calls the attention of the court to the proposed amendment above referred to which is marked Exhibit A and is hereto attached and made a part hereof, and affiant further says he is ready and willing to make the amendment so allowed by the court, and desires and will do so at any time in open court under its direction.

EDWIN W. TOOLE.

April 5,1895.

(Jurat.)

41 *Opinion of the Court.*

(Name of Court.)

(Title of Cause.)

Statement of Facts.

This court granted a motion filed by plaintiff for judgment on the pleadings as originally filed in this cause July 14, 1891, and in its opinion of that date stated the issues involved as follows:

"The plaintiff Horsky brings this action to quiet title to a fractional piece of ground located on Main street, in the original town site of Helena. The facts admitted by the pleadings are substantially as follows: When the probate judge of Lewis and Clarke county, as trustee for its occupants, made entry of the town site of

Helena on March 2nd, 1869, the defendant Moran resided upon and was in possession of this fractional piece of land. The trustee caused the town site to be platted by one E. C. Wheaton, and the Wheaton plat and survey was the plat with reference to which he issued deeds to the original claimants of town lots. In 1885, under authority of an act of the legislature, a new plat of the original Helena town site was prepared. On the latter plat appears this fraction, designated as lot 31, block 37. The McIntire plat shows the contiguous lots to be Nos. 19 and 20. The fraction does not appear on the Wheaton plat under any specific designation or as a separate parcel of land. If it is shown at all, it is included in lots 19 and 20 of block 37 thereof. The defendant never received or applied for a deed to this fraction, except as hereinafter
42 appears. He allowed possession of it to pass to the plaintiff and his predecessors in interest, who received deeds to lots 19 and 20, block 37, in accordance with the Wheaton plat, in 1874. Ever since 1874 the plaintiff has been in the exclusive and actual possession of this fraction and certain lands which he claims were numbered on the Wheaton plat as lots 17, 18, 19, and 20, contiguous to the same. In 1888 the defendant applied for and obtained a deed to the land in controversy in accordance with the McIntire plat, which, as stated, designated the tract as lot 31, in block 37. The defendant contends that he was one of the beneficiaries for whome the town site of Helena was entered; that this fraction was never shown upon any plat until 1885; that consequently he never was in a position to obtain a deed for it until after that year, and that the deed received by him in 1888 related back to and evidences and confirms his beneficiary title of 1869. He denies in his answer that lots 17, 18, 19, and 20, block 37, referred to in plaintiff's complaint, occupy the same position on the earth's surface as the lots so numbered which had been originally platted by Wheaton.

He avers, also, by his negotiations that the Wheaton plat did not at the time plaintiff's deeds were executed correctly show the geographical location of Main and Jackson streets, which were referred to in said deeds as boundaries. The language of defend-
43 ant's denials in this respect is somewhat vague and ambiguous; but it is inferentially his intention to assert that neither this land in dispute nor the contiguous parcels of which plaintiff is the occupant, claiming the same by virtue of deeds, were ever held by virtue of any valid deeds. To put it more clearly, defendant admits that plaintiff has been an occupant of said lands for the time alleged, but denies that the deeds to him and his predecessor were for identical parcels of land."

An appeal was taken from the judgment rendered on July 14th, 1891, and the supreme court reversed the same, holding that certain issues of fact raised by the pleadings had been ignored.

There is before me now an amended complaint and an amended answer on which plaintiff again moves for judgment. This amended complaint is substantially the one originally filed, but in the amended answer the defendant, conceding the facts claimed by plaintiff to constitute adverse possession and wholly eliminating

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the issues as to the identity of the lot on the earth's surface and the denials which the supreme court construed to raise certain issues of fact, by his averments set forth that he was in possession of a validly located placer claim at the date of the application for and the entry of the Helena town site, and that the deed procured by himself in 1888 was obtained for the purpose of doing the annual assessment work required by law on his placer claim
44 in plaintiff's possession and obtaining the title thereto from the United States Government. He now insists that his title to the lot in controversy springs from his location of land embracing it, as a placer claim, and virtually disclaims any right to the same by reason of the probate judge having entered it with other lots lying within the exterior boundaries of the Helena town site as a trustee for himself as an occupant. The gist of the present controversy is stated in the present opinion.

In this action the defendant Moran contends that the mining claim, located prior to and in his possession at the date of the application for the Helena town site, was absolutely excluded from and that the title thereto did not pass under the United States patent to the probate judge for said town site. If this premise is conceded it necessarily follows that the plaintiff has gained no right by adverse possession to the lot of land in controversy, because the legal title to the same is still vested in the United States Government.

Defendant relies chiefly upon several decisions of the supreme court of Montana when a territory, cases in which (save Thomas *vs.* King) conflicts arose between parties claiming the title to lots in patented town sites and claimants basing their title to the same on patents issued for mining claims located prior to the applications for the town-site patents.
45 He cites Silver Bow M. & M. Co. *vs.* Clark *et al.*, 5 Mont., 378; Talbot *vs.* King, 6 Mont., 76; King *vs.* Thomas, 6 Mont., 409; Butte City Smokehouse Lode Cases, 6 Mont., 397, and certain decisions of the United States Supreme Court on which the Montana cases depend. The decisions of the United States Supreme Court in cases where conflicts have arisen between holders of quartz lode locations or patents and patented placer locations, if applicable, apparently favor defendant's contention of an absolute exclusion.

See—

Mantle *vs.* Noyes (5 Mont., 274), 127 U. S., 348.
Sullivan *vs.* I. S. M. Co., 109 U. S., 550; 143 U. S., 394.
Reynolds *vs.* I. S. M. Co., 116 U. S., 678; 124 U. S., 374.
Iron S. M. Co. *vs.* Campbell, 135 U. S., 286, and
Iron S. M. Co. *vs.* Mike & Starr Co., 143 U. S., 394.

All of these cases save Mantle *vs.* Noyes (an equitable action) were actions in ejectment.

These decisions hold that in a placer patent there are excepted and reserved by the terms of the particular statutes regulating placer claims from the conveyance any vein or lode within the

placer claim known to exist at the date of the application for the patent. Any prior valid quartz location within such area is also excepted.

46 In Mantle *vs.* Noyes, 127 U. S., on page 333, the court, however, places this latter kind of exception on the following ground: "The section (2333, U. S. Rev. Statutes, regulating placer patents) can have no application to lodes or veins within the boundaries of a placer claim which have been previously located under the laws of the United States and are in the possession of the locators or their assigns;" and it declares that such locations have already been disposed of by the Government—citing from Belk *vs.* Meagher, 104 U. S., 279: "A mining claim perfected under the law is property in the highest sense of the term, which may be bought, sold, and conveyed, and will pass by descent."

Whether logical or not, there is a recognized distinction in the doctrine of reservation or exclusion applied to placer patents and the one applied to pre-emption, homestead, and town-site patents. The last three in this respect are classed together.

See Deffenback *vs.* Hawk, 115 U. S., on page 404, and Barden *vs.* N. P. R. R. Co., 154 U. S., on page 322.

These placer quartz patent cases, then, cannot control the present controversy, despite their apparent applicability by logical analogy.

At the time of the issuance of the patent for the original town site of Helena, the general control or supervision of the title

47 to land embraced therein had been entrusted to the officers of the Land Department of the Government. Whether the said land or any portion of it was mineral or non-mineral in character, this was true. The officers of the Land Department allowed the town-site entry, received the purchase price for *for* every portion of land included therein, and a patent was issued for the same. Under these conditions, is the patent void or voidable as to the mining claim located by the defendant?

A patent issued by the Land Department of the United States, as a general rule, transfers the legal title to the land, and has attached to it all presumptions of conclusiveness. It may, however, be absolutely void on its face; and this may be shown when it is considered with reference to the statutes governing it, of which judicial notice is taken, as, for example, when the land described therein has been absolutely reserved from sale or the Government has no title to it or the Land Department officers attempt to convey an unauthorized amount of land.

When so void advantage may be taken of it collaterally in any form of action, legal or otherwise, without extrinsic proof. Such nullity may also appear and be declared from a consideration of extrinsic proof in connection with the law governing it, as, for instance, where in a conflict between two patents for the same

48 tract of land each regular on its face, it is shown that the junior patent is based upon an entry and certificate of final proof and purchase prior in time to the senior patent. Of course, where it readily appears from extrinsic proof, in the light of the law, that the Land Department had no subject-matter on which to

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act, as, for instance, where the proof showed that the land embraced in the patent never belonged to the United States, or that it had been previously granted in a regular patent issued by the officers of said department acting within the scope of their authority in the Land Department, can be shown collaterally even in an a ctin at law is clear. The same principal would apply where a deed on which a grantee relies is shown to be for property never owned by the grantor or previously conveyed by him.

In the case of The United States *vs.* Schurz, 102 U. S., 378 (which rather strangely is cited in Iron Silver Mining Co. *vs.* Campbell, 135 U. S., 301, a placer-quartz contest), a homesteader had received a certificate of final proof and receipt of purchase price paid for his land, and the persons actually contesting his title were town-site claimants. The court used the following language: "We are not prepared to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one; but the distinction between a void and
49 a voidable instrument, though sometimes a very nice one, is still a well-recognized distinction on which valuable rights often depend. If a patent should issue for land in the State of Massachusetts, where the Government never had any, it would be absolutely void. If it should issue for land once owned by the Government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent. Here the question is whether this land has been withdrawn from the control of the Land Department by certain acts of other persons which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. If they (the land officers) decided erroniously the patent may be voidable, but not absolutely void."

In this case it is true a contest was pending in the land office between the holder of the homestead certificate and the town-site lot claimants, the latter, no doubt, as a matter of fact, being mere trespassers and not in a position to contest under later authorities. See Kemp *vs.* Smelter Co., 104 U. S., 644. It is true, also, that where parties have had a contest over their claims in the Land Department, and one has succeeded in obtaining, virtually as a result of the contest, a patent, the courts either refuse altogether or are very
50 reluctant to go behind the decision of the land office in the premises.

U. S. *vs.* Throckmorton, 98 U. S., 61.
Vance *vs.* Burbank, 101 U. S., 514.
U. S. *vs.* Minor, 114 U. S., 233.
Steele *vs.* Smelting Co., 106 U. S., 447.

But the language I just quoted is clearly applicable in a general way to this question of how a patent may be attacked.

There are certain decisions, however, often cited as holding that even when a patent regular on its face has been issued by officers of the Land Department acting apparently within the scope of their jurisdiction—that is to say, having a general supervision of the title

to the land conveyed—extrinsic evidence may be offered in an action at law to establish as a matter of fact said officers had no authority to issue the patent for the reason that the land had been previously disposed of or reserved from sale.

See Smelting Co. *vs.* Kemp, 104 U. S., 636.
Steel *vs.* Smelting Co., 106 U. S., 447.
And also various decisions in which they are cited.

It is from obscure language used in some of these decisions, mainly the phrase "previously conveyed," that confusion arises as to what constitute such *such* an absence of authority as will authorize a judgment of nullity on collateral attack. The Montana decisions relied upon by defendant indicate this confusion. A careful consideration of the case, however, satisfies me that the obscure expressions from which it results are susceptible of definite
51 interpretation and construction. The general rule, to reiterate, is as follows: "It has always been held that an absolute want of power to issue a patent could be shown in a court of law to defeat a title set up under it, though where it is merely voidable the party may be compelled to resort to a court of equity to have it declared."

Sherman *vs.* Buck, 93 U. S., 216.

In Doolan *vs.* Carr, 125 U. S., 618, an action of ejectment brought by a grantee under a U. S. patent to a railroad company against two persons in possession who had attempted to file declaratory pre-emption statements for the same in the land office, but had not been permitted to do so, the court, on page 624, uses the following language:

"There is no question as to the principle that where the officers of the Government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title, but if these officers acted without authority, if the land which they purported to convey had never been within their control or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in them to act on the subject-matter of the patent, not merely voidable, in which case, if the circum-
52 stances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction established by the law and it has been often asserted in this court that even a patent from the Government of the United States, issued with all the forms of the law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue.

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The decisions of this court on this subject are so full and decisive that a reference to a few of them is all that is necessary. Polk's Lessee *vs.* Wendall, 9 Cranch, 87; New Orleans *vs.* U. S., 10 Peter, 730; Wilcox *vs.* Jackson, dem. McConnell, 13 Pet., 498, 509; Stoddard *vs.* Chambers, 2 How., 284, 317; Eastman *vs.* Salisbury, 21 How., 426, 428; Reichart *vs.* Felps, 6 Wall., 160; East *vs.* Polk, 18 Wall., 112, 117; Leavenworth R. R. *vs.* U. S., 92 U. S., 733; Newhall *vs.* Sanger, 92 U. S., 761; Sherman *vs.* Buick, 93 U. S., 209; Smelting Co. *vs.* Kemp, 104 U. S, 636; Steel *vs.* Smelting Co., 106 U. S., 447; Kan. Pac. R'y Co. *vs.* Dunmeyer, 113 U. S., 629, 642; Reynolds *vs.* I. S. M. Co., 116 U. S., 687."

See also Knight *vs.* U. S. Land Asso., 142 U. S., 161.

I cite the case of Doolan *vs.* Carr because it is sweeping in its announcement of the right to attack a patent collaterally
53 and cites many decisions on the subject, but it appears in this very case that the patent to the railroad company was for lands over which (as appellants contended) at the date of its issuance the Land Department had absolutely no control, as they were *sub judice*. No legal title could have passed under the proof offered, as it tended to show both that the land in controversy had never been embraced in the railroad grant and was not public when included in the patent, and the court seems to have had prominently in view the principle that in an action of ejectment the plaintiff must prevail on the strength of his own title. See page 629 of the opinion. (See also Steel *vs.* Smelting Co., 106 U. S., on page 452, as to this principle controlling in actions of ejectment.)

Chief Justice Waite in his dissenting opinion, on page 636, summarizes his conclusions from a view of the cases, cited by a majority of the court, as follows: "Many more cases of a similar character might be cited, but it is needless to pursue them further. They establish beyond all question that if one holds under an older title, or if he is in possession under a junior claim to represent the title of the Government, he may attack the validity of the patent in a suit at law on the ground that it was issued without proper authority. On the other hand, it seems to me well settled that if he who seeks to contest the patent is a volunteer, a mere intruder, he will not be heard." And he cites numerous authorities sustain-
54 ing this view. The main ground of his dissent was that the defendants being mere intruders, whose pre emption entries had never been received, were not in a position to question the patent.

He quotes also in this dissenting opinion, on page 637, from the language of Chief Justice Marshall in Hoofnagle *vs.* Anderson, 7 Wheat., 212, as follows: "A patent appropriates the land it covers, and that land, being no longer vacant, is no longer subject to location. If the patent has been issued irregularly the Government may provide means for repealing it, but no individual has a right to annul it, to consider the lands still vacant, and appropriate it to himself"—pp. 214, 215. "This seems to me," Judge Waite continues, "to be the true rule; and one way the Government may

adopt to annul a patent which has been issued without authority of law is to grant the land to another, and thus clothe the new grantee with its own power to test the validity of the former proceeding to divest it of title. Such a grantee will thus be made to represent the United States by authority, and he may sue for the land. With such a title, or something equivalent to it, the courts may properly, as has been done heretofore, allow him to assert his own title—that is, the title of the Government against one which was apparently granted before. Such an attack on the title would be direct, not collateral, as authority to proceed had been given by the Government for that purpose."

55 I do not think that Chief Justice Waite states his view of the subject very clearly, but his collation of the authorities is convenient, and the distinction he seeks to establish between mere intruders who attempt to attack a patent collaterally and persons having a direct interest in its impeachment is apparent. In so far as his doctrine as to mere intruders being applicable in actions at law, however, it seems somewhat anomalous. It evidently is a recognition of the application of equitable principles in strictly legal actions.

Equity furnishes ample relief where a patent has been issued to one when another is entitled to it. Where the Land Department through mistake or inadvertence has issued to one a patent for land to which another is entitled, equity will afford relief in a suit instituted by the Government to set aside the patent.

U. S. *vs.* Hughes, 4 Wall., 23.
U. S. *vs.* Minor, 11 U. S., 233.
Chandler *vs.* Calumet & Hecla Min. Co., 149 U. S., on page 93.

Even without the intervention of Government, equity will give appropriate relief as between the contestants themselves where the Land Department by mistake of law or such inadvertence has given to one man land which on the undisputed facts belongs to another.

Moore *vs.* Robbins, 96 U. S., 530.
See also U. S. *vs.* Curtner, 149 U. S., 662.

56 In United States *v.* Stone, 2 Wall., 535, the court uses this language: "A patent is the highest evidence of title and is conclusive against the Government and all claiming under junior patents or titles until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy." And then somewhat confusingly continues: "Nor is fraud in the patentee the only ground on which a bill will be sustained. Patents are sometimes issued unadvisedly or by mistake where the officer has no authority in the law to grant them or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of the grant, and the officer who issues it acts ministerially, and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the

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Land Department is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of a court."

In this action a bill in equity was filed to cancel certain patents which had been issued for lands previously segregated as a military reservation.

It is at least clear from the opinion that a bill in equity was
57 the proper remedy against these patents, and this would seem to be a recognition that they were only voidable as against the Government until set aside, although the opinion states that they were void *ab initio*. In fact, the rule as to attacking a patent is not at all obscure when applied as between a patentee and the U. S. Government. In the case of The United States *vs.* Hughes, 4 Wall., 232, where land had been patented to Hughes in disregard of the rights of Goodbee, a pre-emptioner who was in possession at the time of the issuance of the patent, had paid the purchase price of the land and held, a receiver's certificate, the court said—page 236: "When this case was here on demurrer (18 U. S., 711) the patent was considered by the court to be a valid instrument, conveying the fee of the United States, and, until annulled, as rendering them incapable of complying with their agreement to Goodbee or his alienees. Whether regarded in that aspect or as a void instrument, issued without authority, it *prima facie* passed the title, and therefore it was the plain duty of the United States to seek to vacate and annul the instrument, to the end that the previous engagement might be fulfilled by the transfer of a clear title, the only one intended for the purchaser by the act of Congress.

"The power of a court of equity, by its decree, to vacate and annul the patent under the circumstances of this case, is undoubted. Relief, when deeds or other instruments are executed by mistake or inadvertence of agents as well as upon false suggestions, is a common head of equity jurisdiction."

58 In the case of U. S. *vs.* Beebe, 127 U. S., 338, is cited the case of U. S. *vs.* Hughes, *supra*, with approval. In the Beebe case, fraud in the procurement was the ground on which patent was sought to be set aside, but it was claimed to be void also on the ground that at the date of the issuance of the patent the United States had no title to the land conveyed. The court denied the relief sought. Curtner *vs.* U. S., 149 U. S., 662, following U. S. *vs.* Beebe in principle and deciding against the U. S., was a case where a bill in equity was filed by the Government to set aside certain lands which by error and inadvertence and mistake on the part of the officers of the Land Department had been listed to the State of California, when, as a fact, they had been previously granted by an act of Congress to a railroad company. The court said: "If that action was wholly void, then it was open to collateral attack, and the railroad company and its grantees could have brought suit to test the legal title at once. Doolan *vs.* Carr, 125 U. S., 618. If that action was not void, but the Interior Department had taken mistaken views of the law or drawn erroneous conclusions from the evidence, and the railroad company and its grantees possessed such

equities as would control the legal title vested in the State and its grantees, the resort could have been had to a court of equity for relief. Smelting Co. *vs.* Kemp, 104 U. S., 636."

59 If, then, even in an equitable proceeding brought directly by the Government to set aside a patent because the lands embraced in it had been previously disposed of, such a patent, in so far as it relates directly to the Government, is not, as a rule, considered as void *ab initio*, surely the court must regard it as having passed the legal title. This doctrine of voidability only as to the Government is incidentally recognized in actions at law.

In Wright *vs.* Roseberry, 121 U. S., ejectment brought by a claimant under a railroad grant against holders of agricultural patents based upon settlements subsequent to the grant, the court says, on page 518: "These patents were evidence that whatever title the United States then held passed to the patentees."

In Richnall *v.* Comstock, 113 U. S., 149, a suit on a covenant of warranty, but as a matter of fact brought for the purpose of establishing the superiority of a title claimed under a State grant, the court said: "It is not necessary to decide whether this patent conveyed a valid title or not. It divested the title of the United States if it had not been divested before. * * *"

This language in Water and Mining Co. *v.* Bugbey, 96 U. S., 165, is also apposite. The court, on page 167, said: "In Sherman *v.* Buick (93 U. S., 209) it was decided that the State of Califor-

60 nia took no title to sections 16 and 36 under the act of 1853 as against an actual settler before the survey claiming the benefit of the pre-emption laws, who perfected his claim by a patent from the United States. * * * As against all the world except the pre-emption settler, the title of the United States passed to the State upon the completion of the surveys, and if the settler failed to assert his claim or to make it good, the rights of the State became absolute."

There is an inconsistency in regarding the patent as voidable only so far as the United States Government is concerned, but as absolutely void *ab initio* in so far as it conflicts with the right of one to whom, in the language of the cases, the land embraced in the patent has been previously disposed.

To illustrate this: In U. S. *v.* Hughes, *supra*, Goodbee, in whose behalf the Government filed the bill in equity to set aside the Hughes patent, was in possession under a certificate of purchase; while in Doolan *v.* Carr, a suit in ejectment, the plaintiff claimed under a patent land in possession of the defendants, who had not even filed pre-emption entries. Chief Justice Waite, in his dissenting opinion in Doolan *v.* Carr, 125 U. S., says: "I feel compelled to withhold my assent to this judgment. The ground of my dissent is not that in a proper case the validity of a patent of the

61 United States for the conveyance of lands may not be attacked in a suit at law by proving that it was issued without the requisite authority, but that this is not a proper case for the application of the rule. To show that I recognize the existence of the right to make such proof, if the person who offers it is in a

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position to do so, it is only necessary to refer to Simmons *v.* Wagner, 101 U. S., 260, where, as the organ of the court, I announced the decision that one in possession under a certificate issued by a proper officer in the regular course of his official duties, showing that he had bought and paid for the land, might successfully defend an action of ejectment brought against him by the holder of a patent issued upon an entry by another party made long after his rights accrued; and this because, after a purchase under which he was in possession, the land was no longer a part of the public domain, and the officers of the United States had no authority to sell it a second time.

In my opinion, however, such proof can only be made by one who holds a right at law or in equity which is prior in time to that of the patentee, or by one who claims under the United States by a subsequent grant or some authorized recognition of title. Unless I have misinterpreted the cases on this subject, that has always been the doctrine of this court."

Judge Hanford, in Stinson Land Co. *v.* Rawson, 62 Fed. Rep., on page 428, says:

"The decisions of the Supreme Court of the United States establish the following propositions: When land has been sold by the United States and the purchase-money paid, it becomes
62 segregated from the body of the public lands, and is no longer the property of the Government, but is the property of the purchaser. Carroll *v.* Safford, 3 How., 460; Witherspoon *v.* Duncan, 4 Wall., 210; Wirth *v.* Branson, 98 U. S., 118; Simmons *v.* Wagner, 101 U. S., 260. After a sale, until the patent is issued, the Government holds the mere legal title in trust for the purchaser; and, in case of a resale, the second purchaser would take the title charged with the trust. Carroll *v.* Safford, *supra*; Lindsay *vs.* Hawes, 2 Black, 554. When the right to a patent becomes perfect, the full equitable title passes to the purchaser with all the benefits, immunities, and burdens of ownership. Benson M. & S. Co. *v.* Alta M. & S. Co., 145 U. S. 428; 12 Sup. Ct., 877. A contract for the purchase of public land is complete when the certificate of entry has been executed and delivered. Witherspoon *v.* Duncan, *supra*. A patent certificate protects the purchaser's rights as fully as a patent. Carroll *v.* Safford, *supra*. A vested right to a patent for public land is equivalent to a patent issued. Stark *v.* Starrs, 6 Wall, 402. The execution and delivery of a patent after the right to it has become complete are ministerial acts of the officers charged with that duty. Simmons *v.* Wagner, *supra*."

Conceding that Judge Hanford and Chief Justice Waite correctly declare the rule, would it not be better legal logic invariably
63 where a *prima facie* holder of the legal title which has been conveyed to him by the officers of the Land Department who exercise a general supervision of the title brings an action in ejectment against the holder of the equitable title in possession to confine the latter to equitable redress?

It may be, then, that too much liberality in expression has been indulged in as to allowing extrinsic evidence to be offered in an

action at law by one in possession to establish a lack of authority on the part of the officers of the Land Department in the issuance of a patent. But if this be true, the language in some of the quartz-placer conflict cases to the contrary notwithstanding, this liberality has been indulged in where there were defendants in possession closely connected with the Government title either legally or equitably. Now, what is the character of the title obtained by defendant to the land in controversy from his mining location? Was the land embraced therein previously disposed of by the Government as far as the town-site patent is concerned?

I am well aware that in several cases, notably Belk *v.* Meagher, 104 U. S., p. 283, and Forbes *v.* Gracey, 94 U. S., 762, that the title conferred by a mining location is spoken of in terms of such high respect as almost to justify the inference that it is on a par with a title by patent or one based on a certificate of final proof and purchase, but surely the court, using this language in cases where vital existing rights or claims of rights were before it, did not intend
64 such inference to be drawn and applied to all cases.

Before the holder of such a claim has made proof of his compliance with the statutory requirements regulating the obtainment of a patent to his location and paid the purchase price therefor, he has only an inchoate right to title at best.

He is under no obligation to make final proof and pay the purchase price so as to entitle him to patent.

Water & Mining Co., 96 U. S., on page 167.

It is well to notice here that there is a clear distinction between the holders of a valid claim whose rights are possessory only and one who, having fulfilled all the conditions required by law, has received or is entitled to a certificate of purchase.

See Sherman *v.* Buick, 93 U. S., 209.
Simmons *v.* Wagner, 101 U. S., 360.
Stimson *v.* Land Co. *v.* Rawson, 62 Fed. Rep., 427.

There is no grant *in presenti* under the mineral laws to the mere locator of a mining claim. "There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. * * * In other words, when an immediate grant was intended an immediate grantee having all the requisite qualifications was named."

Hall *v.* Russell, 101 U. S., 509.

65 Again, the court, on page 512, says: "Had it been supposed that the title was already in the settler, subject only to defeasance, if the condition subsequent to the grant should not be performed, we cannot but think that provision would have been made for a transfer of the land free from the condition instead of only the settler's rights."

It is true this language is used with reference to settlers under the Oregon donation act, but *mutatis mutandis*, I regard it as applicable.

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In the swamp-land and railroad-grant cases the titles under the acts of Congress are held to be grants *in presenti*.

See Frasher *vs.* O'Connor, 115 U. S., 102.
Wright *vs.* Roseberry, 121 U. S., 488.
Deseret Salt Co. *vs.* Tarpey, 142 U. S., 79.
Chandler *vs.* Calumet & H. M'g Co., 149 U. S., 79.

There is certainly a distinction to be drawn between a title claimed merely by virtue of a valid location without even possession and those claimed under grants *in presenti* or final certificates of proof and purchase. The first as a title is but inchoate in its nature, and, if a grant, is a grant upon conditions precedent.

Of the other two, the titles under the act of Congress held conveyances *in presenti* are grants upon conditions subsequent, and those under certificates of final proof and purchase are placed in the same category with patents.

66 As I have shown, town-site patents are classified with homestead and pre-emption patents as distinguished from placer patents.

The title conferred on defendant by virtue of his mining location was in the nature of an easement only.

Benson Min. Co. *v.* Alta Min. Co., 145 U. S., 43.
See Stinson Land Co. *v.* Rawson, 62 Fed. Rep., 426.

I am satisfied from all the authorities that the United States Supreme Court would regard this patent to the probate judge as only voidable under the facts presented by the pleadings in this case, even in an action at law. The phrase "previously disposed of" should not be construed to include defendant's abandoned easement.

I am strengthened in the conclusion that this patent is voidable only by the cases of Davis *v.* Wiebold, 139 U. S., 528, and N. P. R. R. Co. *v.* Barden, 154 U. S., 288. If they did not expressly decide, as maintained by counsel for plaintiff, that when the officers of the Land Department have issued a town-site patent they must presumably have passed upon the mineral character of the land conveyed, as it was within their jurisdiction to do so, and consequently as there was a precedent question of fact presumptively determined by them, there can be no collateral attack on such a patent, as it is voidable only, not void—at least indicate that the court was inclined to so hold.

67 Nor do I regard the case of Dower *v.* Richards, 151 U. S., 658, as even implicating to the contrary.

It does not appear that any point was made as to the conclusiveness of the town-site patent or that the question was even considered.

This doctrine claimed by counsel for plaintiff to have been enunciated in the Barden case would be a logical result of many utterances of Justice Field, the organ of the court in many previous cases.

He says in Wiebold *v.* Davis, on page 528: "If after the intro-

duction of the town-site patent and the deed to the defendant the objection had been raised to the jurisdiction of the Land Department to issue the patent in question for minerals in lands which have been previously conveyed to the defendant, a much more serious question would have been presented." And on pages 528, 529, he expressly denies that Steel *v.* Smelter Co., 106 U. S., 447, authorized the location of a mining claim within the boundaries of a patented town site.

In both Wiebold *v.* Davis and the Barden case his citation of Kemp *v.* Smelting Co. and Deffenback *v.* Hawke indicate that he even regards them as authorities in favor of the contention of counsel for the plaintiff. And in his dissenting opinion in Iron S. M. Co. *v.* Mike & Starr Co., 148 U. S., 394, on page 416, he says:

68 "The presumption in favor of its validity attends the placer patent as it does all patents of the Government of any interest in the public lands which they purport to convey. So potential and efficacious is such presumption that it has frequently been held by this court that if under any circumstances in the case the patent might have been rightfully issued, it will be presumed as against any collateral attack that such circumstances existed."

Smelting Co. *v.* Kemp, 104 U. S., 636, 646.

The above language is substantially the same that he used in his opinion in the case of Moffit *v.* U. S., 112 U. S., 24.

I believe that if this case were before the Supreme Court of the United States today the judges would hold that in the issuance of a patent for the Helena town site the Land Department presumably decided as a mixed question of law and fact that the defendant Moran did not have a valid mining location within its bounds, and that the case of U. S. *vs.* Schurz, 102 U. S., 378, would be cited as directly in point.

If, then, this patent is not void as to this lot in controversy by reason of the mining claim in the town site at the date of the application and its entry and patent, necessarily the test to be applied is: What standing has defendant in equity as to the conveyance of the town-site patent so far as the lot in controversy is concerned?

In Smelting Co. *v.* Kemp the court says: "If in issuing a patent its officers took mistaken views of the law or drew erroneous conclusions from the evidence or acted from imperfect views of

69 their duty or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connects himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent, and he must possess such equities as will control the legal title in the patentee's hands. Boggs *v.* Merced Min. Co., 14 Cal., 279, 363. It does not lie in the mouth of a stranger to the title to complain of an act of the Government with respect to it. If the Government is

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dissatisfied it can, on its own account, authorize proceedings to vacate the patent or limit its operation."

Does defendant, by his answer, show himself to be entitled to equitable relief on any of the above grounds? He admits that he has not been in possession of the lot in controversy for some twenty years. Does this sufficiently connect him with the original source of title? Even if he were to prevail upon the U. S. Government to file a bill to set aside this patent as to the lot in controversy, could such a bill be maintained on the facts he pleads? Certainly not, under the rule established in U. S. *v.* San Jacinto Min. Co., 125 U. S., 273; U. S. *v.* Beebe, 127 U. S., 338; and U. S. *v.* Curtner, 149 U. S., 662.

70 The United States is under no obligation whatsoever to reinstate him in the position he occupied as to this mining claim some twenty years ago, and, under the authority of these last-cited cases and numerous others, his self-confessed laches, wholly unexplained, place him beyond the pale of any equitable relief, either directly or indirectly, through the intervention of the Government.

As to the deed obtained from the probate judge, upon which defendant relies, he himself claims that he obtained it for the purpose of assuring the title obtained by his mining location. If this be true, it should be set aside under the view I have expressed, but if he relies upon it as an independent source of title, upon the authority of the previous decision I rendered in this case and the opinion rendered by the supreme court of Montana in reviewing it, Horsky *vs.* Moran, 13 Mont., 250, I must hold it to be null and void.

I do not deem it necessary to decide the point made by counsel for the plaintiff that the defendant having himself accepted a deed from the probate judge to the lot in controversy is not in a position to question that trustee's title, but I am inclined to think he is right.

The plaintiff's motion for judgment on the pleadings is granted.

HORACE R. BUCK, *Judge.*

March 2nd, 1895.

71 *Notice of Appeal.*

(Name of Court.)

(Title of Cause.)

Take notice that the defendant above named hereby appeals to the supreme court of the State of Montana from the judgment of the district court of the first judicial district of the State of Montana in and for the county of Lewis and Clarke, in the above-entitled action, on the 10th day of June, 1895, made and entered in favor of the plaintiff and against the defendant, quieting the title of the plaintiff

to the premises described in the complaint and for costs to the said plaintiff.

T. J. WALSH,
Defendant's Attorney.

To Messrs. Toole & Wallace, plaintiff's attorneys.

Due personal service of the foregoing notice this 25th day of July, 1895, hereby admitted.

TOOLE & WALLACE,
Plaintiff's Attorneys.

(Filed July 26, 1895.)

72 (Name of Court.)

(Title of Cause.)

Undertaking on Appeal.

Whereas the defendant in the above-entitled action is about to appeal to the supreme court of the State of Montana from a judgment and decree entered against him in said action in the district court of the first judicial district of the State of Montana in and for the county of Lewis and Clarke, on the 19th day of June, 1895, quieting the title of the said plaintiff to the premises described in the complaint and in controversy in this action, and for his costs:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, of the said county and State, do hereby jointly and severally undertake and promise on the part of the said defendant and appellant that he, the said defendant and appellant, will pay all damages and costs which may be awarded against him on the appeal or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

MOSES FURLONG.
W. A. RUMSEY.

Justification.

73 STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

I, John Bean, clerk of the district court of the first judicial district of the State of Montana in and for the county of Lewis and Clarke, do hereby certify that the foregoing transcript contains a full, true, correct, and compared copy of the original amended complaint, amended answer, motion for judgment, motion for judgment as amended, judgment, bill of exceptions, amendment asked by defendant, opinion of court, notice of appeal, and undertaking on appeal in the cause of Horsky *vs.* Moran, as appears from the records in my office.

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Witness my hand and the seal of the said court this 10th day of September, 1895.

[SEAL.]

JOHN BEAN, *Clerk*,
By JESS C. RICKER, *Deputy*.

Transcript filed in supreme court September 11, 1895.

74 In the Supreme Court of the State of Montana.

JOSEPH HORSKY, JR., Respondent,
vs.
PATRICK MORAN, Appellant.

It is hereby stipulated that the pleadings contained in the transcript heretofore filed in this court shall be considered as a part of the transcript in this court upon the present appeal, in which was filed in this court a transcript on the 11th day of September, 1895.

October 1st, 1895.

EDWIN W. TOOLE,
Attorneys for Respondent.
T. J. WALSH,
Attorney for Appellant.

Stipulation filed in supreme court December 2, 1898.

75 *Order.*

JULY 25TH, 1898.

JOSEPH HORSKY, JR., Respondent,
vs.
PATRICK MORAN, Appellant.
Case No. 813.

This cause this day came on for the judgment and decision of the court on appeal; whereupon, on consideration, it is now here ordered and adjudged that the judgment of the court below, made and entered on the 10th day of June, A. D. 1895, be, and the same is hereby, affirmed with costs.

Opinion by Hunt, A. J.; Pigott, A. J., concurring.

Order.

AUGUST 1ST, 1898.

(Title of Cause.)

Appellant's motion to stay remittitur herein is granted until October 1st, A. D. 1898.

76 (Supreme Court of Montana, July 25, 1898.)

JOSEPH HORSKY, JR., Respondent,
vs.
PATRICK MORAN, Appellant.

Opinion of Court.

Action to quiet title.

Opinion of the court by HUNT, *J.*:

The pleadings show substantially the facts to be as follows: That when the probate judge of Lewis and Clarke county, as trustee for the occupants of the town site of Helena, made the entry of the town site on March 2, 1869, the defendant and appellant Moran resided upon and was in possession of certain fractional parts of ground located on Main street, in the original town site of the city of Helena. The town site was platted and deeds issued to the original claimants of town lots, and in 1874 plaintiff and his predecessors in interest received deeds to the aforesaid lots in controversy from the probate judge. Plaintiff ever since 1874 has been in the exclusive and actual possession of the property sued for. In 1888 the defendant applied for and obtained a deed from the probate judge to the land in dispute.

The defendant concedes the facts claimed by the plaintiff to constitute adverse possession, but sets up that he was in posses-
77 sion of a validly located placer claim at the date of the application for and the entry of the Helena town site, and that the deed procured by him in 1888 was obtained for the purpose of further assuring his title to the property and to enable him to get into possession in order to prosecute the necessary development work on his mining claim, but that the plaintiff refused to recognize his right to the possession of the premises described in the deed or to allow him to enter into possession of the same. His position is that his title to the lots in controversy springs from his location of the land, embracing them as a placer claim. He makes no claim of right by reason of the probate judge having entered the lots, with other lots lying within the exterior boundaries of the Helena town site, as a trustee for himself as an occupant, but relies upon the contention that the mining claim located prior to and in his possession at the date of the application for the Helena town site was absolutely excluded from and that the title thereto did not pass under the United States patent to the probate judge for said town site—that is to say, he stands upon the proposition that the plaintiff Horsky acquired no rights by adverse possession to the lots in question, because the legal title to the same is still vested in the United States.

After the entry of the town site and prior to the time when
78 the plaintiff became the owner of the premises claimed therein, the defendant left the State of Montana, leaving his

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mining claim in the possession of his agent; and he avers that during his absence, as he is informed and believes, plaintiff, without right, entered upon and has since continued to occupy those portions of the mining claim described in the complaint, and that in like manner other parties entered upon other portions and continued to hold and occupy the same and excluded the defendant from the possession thereof. He further set up that under the laws of the United States and the rules governing mining claims he is required, so as to enable him to obtain a patent, to do certain development work, but that the plaintiff refused to permit him to enter upon the premises for the purpose of doing such work, and that any attempt upon his part to enter to do the work would subject him to a summary action and to personal violence, though defendant is and always has been desirous of doing such work and acquiring patent to the mining claim. Defendant's prayer is that the plaintiff be dismissed, and that he (defendant) be decreed to be entitled to the possession of the premises described in the complaint, and that an injunction issue preventing plaintiff from interfering with his work of mining the property involved.

The plaintiff moved for a judgment on the pleadings because the answer stated no defense and was sham and frivolous, and the cause of action was barred on account of laches of the defendant,
79 as shown by the papers and proceedings. The district court granted the motion and rendered judgment in plaintiff's favor, declaring defendant's claim or pretended claim to be void and without right or equity and ordering that the deed of the probate judge to defendant be canceled and made null and void. Defendant appeals.

The record contains the opinion of the district court. It is an elaborate review of the decisions of the Supreme Court of the United States bearing upon the questions involved, and proceeds upon a recognition of the distinctions drawn by the decisions of that court between the reservation or exclusion in and from a placer patent and the doctrine of reservation or exclusion from a town site, homestead, or pre-emption patent. After careful examination of the authorities cited and many more, we have concluded to adopt the opinion of the trial court as expressive of the unanimous views we hold upon the status of this defendant, who assails the possession and claim of title of the plaintiff, and asks affirmative relief, but who shows that he wholly neglected to assert and protect any rights he ever had as the possessor of a valid mining claim when the town-site patent was applied for, and offers no excuse for his inaction during the period of nearly twenty years after plaintiff entered upon and occupied the lots before he brought this suit, except that plaintiff refused to allow him to enter upon the premises. By
80 his answer he shows that he has long since disconnected himself from the United States Government, stands in no privity with it, and possesses no claim, legal or equitable, to the lots which plaintiff has openly, notoriously, and continuously occupied for over twenty years. Defendant is without any title or claim of title at all. He is in the attitude of an intruder, and it does not lie in

his mouth to be heard to assail the plaintiff's position (Bohall *v.* Dilla, 114 U. S., 50). The pleadings therefore make the case a proper one to apply the doctrine of laches, well stated by Justice Brewer in Naddo *v.* Bardon, 4 C. C. A., 642, as follows: "No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and long possessor security and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many."

Although we put our affirmance of the judgment upon the ground of laches, a majority of the court believe that the
81 decision and reasoning of the trial court is the correct solution of the other questions discussed. Judge Buck's opinion is as follows:

(Here follows Judge Buck's opinion as given in Transcript, pages 41 to 70, inclusive.)

The judgment is affirmed. Affirmed.

WM. H. HUNT,
Associate Justice.

I concur in the judgment of affirmance upon the ground that the answer discloses no privity of defendant with the United States.

WM. T. PIGOTT,
Associate Justice.

82 In the Supreme Court of the State of Montana.

JOSEPH HORSKY, JR., Defendant in Error,
vs.
PATRICK MORAN, Plaintiff in Error.

Petition for Writ of Error.

To the Hon. W. Y. Pemberton, chief justice of the supreme court of the State of Montana:

Now comes your petitioner, Patrick Moran, by T. J. Walsh, his attorney, and respectfully represents that in the above-entitled cause, which is not a personal action, but one relating to realty, there was drawn in question the construction of the statutes of the United States, to wit, the construction of section 3392 of the Revised Statutes of the United States, and other sections of chapter VIII of title XXII of the Revised Statutes of the United States, concerning the "reservation and sale of town sites on the public lands," as well as certain sections of chapter VI of the said Revised Statutes, entitled "Mineral lands and mining resources."

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83 And your petitioner further represents that in said cause, as appears by the pleadings and the record, he claims title to the realty in controversy under the provisions of the laws of the United States hereinbefore referred to, and claims that under the provisions of the same laws of the United States the above-named defendant in error has no title to the said premises, and that the decision of the supreme court of the State of Montana in the said cause is against the right and title so, as aforesaid, set up and claimed by your petitioner under the said laws, which were so construed, contrary to the contention of your petitioner, by the supreme court of the State of Montana as that the said court adjudged that the said defendant in error was the owner of the said premises, and that your petitioner had no right or title thereto.

And your petitioner further respectfully represents that in the records and proceedings, and also in the rendition of the said judgment in the above-entitled cause, which is in the supreme court, before you, a manifest error hath happened in the matters and things in your petitioner's assignment of error herein more specifically set forth, to the great injury and damage of your petitioner.

Wherefore your petitioner prays that it may please your
84 honor to grant unto your petitioner a writ of error to remove the said cause and the record thereof into the Supreme Court of the United States, to the end that the error, if any hath happened, may be duly corrected and full and speedy justice done your petitioner.

And your petitioner, as in duty bound, will ever pray.

T. J. WALSH,
Attorney for Plaintiff in Error.

Let the writ of error issue as above prayed for upon the petitioner filing with the clerk of this court a good and sufficient bond, conditioned to prosecute such writ and answer all costs, in the sum of $500, said bond to be approved by the clerk of said court.

W. Y. PEMBERTON,
Chief Justice of the Supreme Court of the State of Montana.

Service of the foregoing petition and order and receipt of a copy of same acknowledged this 24th day of October, A. D. 1898.

EDWIN W. TOOLE,
Attorney for Defendant in Error.

Filed in supreme court Oct. 8th, 1898.

85 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the

State of Montana, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Joseph Horsky, Jr., defendant in error, and Patrick Moran, plaintiff in error, wherein was drawn in question the validity of a statute or treaty of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or
86 commission, a manifest error hath happened, to the great damage of the said Patrick Moran, plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in Washington, in the said Supreme Court, within sixty days from the date hereof, that, the record and proceedings aforesaid be- inspected, that said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 8th day of October, A. D. 1898.

[SEAL.] GEO. W. SPROULE, *Clerk.*

The above writ of error is hereby allowed by—

W. Y. PEMBERTON,
Chief Justice of the Supreme Court of the State of Montana.

87 Copy of the foregoing writ of error served this — day of October, 1898.

EDWIN W. TOOLE,
Attorney for Defendant in Error.

Due service of the above writ of error this 8th day of October, 1898, and a copy left with me at the same time, is hereby admitted.

BENJAMIN WEBSTER,
Clerk of the Supreme Court of the State of Montana,
By WM. H. CURTIS, *Deputy Clerk.*

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88 UNITED STATES OF AMERICA, *ss*:

To Joseph Horsky, Jr., defendant in error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Montana, wherein Joseph Horsky, Jr., is defendant in error and Patrick Moran is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the party on that behalf.

Witness the Honorable William Y. Pemberton, chief justice of the supreme court of the State of Montana, this 8th day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

W. Y. PEMBERTON,
Chief Justice of the Supreme Court of the State of Montana.

Signed and allowed by the chief justice this 8th day of October, A. D. 1898.

BENJAMIN WEBSTER,
Clerk of the Supreme Court of the State of Montana.

Due and lawful service of a copy of the foregoing citation and of the writ of error mentioned therein accepted and acknowledged at Lewis and Clarke county, State of Montana, this — day of October, A. D. 1898.

EDWIN W. TOOLE,
Attorney for Defendant in Error.

Filed in supreme court October 8th, 1898.

89 In the Supreme Court of the State of Montana.

JOSEPH HORSKY, JR., Defendant in Error,
vs.
PATRICK MORAN, Plaintiff in Error.

Know all men by these presents that we, Patrick Moran, as principal, and Moses Furlong and W. A. Rumsey, as sureties, are held and firmly bound unto the defendant in error, Joseph Horsky, Jr., in the sum of five hundred dollars ($500); for the payment of which, well and truly to be made, we bind ourselves and each of our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th day of October, 1898.

Whereas the above-named Patrick Moran has obtained a writ of error and citation directed to said Joseph Horsky, Jr., citing and admonishing him to be present and appear within sixty days after the service of the writ of error and to show cause, if any there be, whether the judgment rendered in the above-entitled action by the

supreme court of the State of Montana on the 25th day of July, 1898, should not be reversed:

90 Now, therefore, the condition of this obligation is such that if the said Patrick Moran shall prosecute said writ of error to effect and answer all costs if he shall fail to make his plea good, then this obligation to be null and void; otherwise to remain in full force and effect.

PATRICK MORAN. [SEAL.]
MOSES FURLONG. [SEAL.]
W. A. RUMSEY. [SEAL.]

Signed, sealed, and delivered in the presence of—
T. J. WALSH.

STATE OF MONTANA,
County of Lewis and Clarke, } ss:

Moses Furlong and W. A. Rumsey, whose names are subscribed as sureties to the above undertaking, being severally duly sworn, each for himself says that he is worth the sum in the said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

MOSES FURLONG.
W. A. RUMSEY.

Subscribed and sworn to before me this 8th day of October, 1898.

T. J. WALSH,
[SEAL.] *Notary Public in and for Lewis and Clarke County, State of Montana.*

91 Approved this 10th day of October, 1898.

W. Y. PEMBERTON,
Chief Justice of the Supreme Court of the State of Montana.

Attested as to approval by and approved by—
BENJAMIN WEBSTER,
Clerk of the Supreme Court of the State of Montana.

Filed in supreme court Oct. 10, 1898.

92 In the Supreme Court of the State of Montana.

JOSEPH HORSKY, Defendant in Error,
vs.
PATRICK MORAN, Plaintiff in Error.

Assignment of Error.

Comes now Patrick Moran, plaintiff in error, by T. J. Walsh, his attorney, and says that the record and proceedings in the above-entitled cause show there is manifest error in this, to wit:

1. The supreme court of the State of Montana erred in holding

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that the district court properly granted the motion of defendant in error for judgment on the pleadings.

2. The said court erred in holding that the answer of the plaintiff in error constituted no defense to the complaint of the defendant in error.

3. The said court erred in holding that the judgment of the district court was right, and in affirming the same.

4. The said court erred in holding that the defendant in error could acquire any rights by adverse possession or under the statute of limitations to the ground in controversy, which the plain-
93 tiff in error held, owned, and occupied as a mining claim at the time of the entry of the Helena town site by the probate judge of Lewis and Clarke county.

5. The said court erred in holding that the defendant in error could acquire any title to the premises in controversy through deeds from the probate judge of the said county, to whom was issued a patent for certain lands embracing within its exterior boundaries the premises in controversy in this action, under the provisions of the laws of the United States concerning the "Reservation and sale of town sites on the public lands," for that the premises in controversy constitute and constituted part of a mining claim owned and occupied by the plaintiff in error at the time of the entry of the Helena town site by the probate judge of Lewis and Clarke county.

6. The said court erred in holding that any failure to assert his rights on the part of the plaintiff in error would give any title to the premises in controversy to the defendant in error, for that the premises referred to being a part of a mining claim owned and held by him at the time of the entry of the town site, the title to the same is either in the United States or in the plaintiff in error.

7. The said court erred in holding that the patent to the probate judge of Lewis and Clarke county had conveyed to him all lands within its boundaries, including valuable mining claim or possession.

94 8. The said court erred in holding that the plaintiff in error lost his rights to his mining claim by not asserting them at the time of the issuance of the town-site patent, and in holding that the issuance of the town-site patent was an adjudication by the Land Department of the Government that there existed no valuable mining claims or possessions within the boundaries of said patent.

9. The said court erred in holding that in order to permit the plaintiff in error to deny the title of the defendant in error to the premises in controversy upon the ground that the title to the same never passed from the Government of the United States to the probate judge of Lewis and Clarke county, he, the plaintiff in error, must connect himself with the Government of the United States or stand in privity with it.

10. The said court erred in holding that the plaintiff in error ever did disconnect himself from the United States Government.

11. The said court erred in holding that the plaintiff in error occupied the attitude of an intruder.

12. The said court erred in holding that the plaintiff in error ever abandoned his mining claim or that he ever lost his right to resume work thereon pursuant to the provisions of section 2324 of the Revised Statutes of the United States.

95 13. The said court erred in holding that the mining claim of the plaintiff in error, located and owned by him and in his possession and occupancy at the date of the application of the probate judge for a patent for the Helena town site, was not absolutely excluded therefrom, and that the title thereto passed from the United States Government to the probate judge by the patent.

Wherefore the said plaintiff in error prays that the said judgment of the said supreme court of the State of Montana be reversed, and that the said court be directed to enter an order reversing the judgment herein.

T. J. WALSH,
Attorney for Plaintiff in Error.

Filed in supreme court Oct. 8th, 1898.

96 STATE OF MONTANA, } ss:
Office of the Clerk of the Supreme Court, }

I, Benjamin Webster, clerk of the supreme court of the State of Montana, do hereby certify that the foregoing is a true copy of the records in the case of Joseph Horsky, Jr., *vs.* Patrick Moran, including the transcript filed in this court, together with the complaint and answer found in the transcript filed upon the former appeal and by stipulation made a part of the transcript first above referred to, and of the judgment of this court and the opinion of the court filed herein; also of the assignment of errors herein filed by the plaintiff in error; all of which is hereby certified and transmitted to the Supreme Court of the United States in obedience to the writ of error filed herein, of which a true copy is also contained in the foregoing record, together with a petition for the said writ, the order for its issue, and the undertaking for costs, filed by the plaintiff in error as the same, and all of the same appear from the records in my office.

Witness my hand and the seal of the said court this 30th day of November, 1898.

[Seal Supreme Court, State of Montana.]

BENJAMIN WEBSTER,
Clerk of the Supreme Court of the State of Montana.

Endorsed on cover: File No., 17,238. Montana supreme court. Term No., 177. Patrick Moran, plaintiff in error, *vs.* Joseph Horsky, Jr. Filed December 27th, 1898.

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No. 177.

Supreme Court U. S.
FILED
FEB 19 1900
JAMES H. MCKENNEY,
Clerk.

No. 177.

By Garland for P. C.

In the Supreme Court

Filed Feb. 19, 1900.

United States.

OCTOBER TERM, 1899.

PATRICK MORAN,
Plaintiff in Error,

vs.

JOSEPH HORSKY, JR.,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

RUFUS C. GARLAND and
THOMAS J. WALSH,
Attorneys for Plaintiff in Error.

THOMAS J. WALSH,
Of Counsel for Plaintiff in Error.

L. Naegele & Sons, Printers, Helena, Mont.

Rec'd copy of within brief February 14, 1900
R. W. Ivie
for Jno. C. Bach

In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1899.

PATRICK MORAN,
Plaintiff in Error,

vs.

JOSEPH HORSKY, JR.,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

This action was instituted in the District Court of Lewis and Clarke County, Montana, by the defendant in error against the plaintiff in error, to quiet the title of the former to Lots 17, 18, 19, 20 and 31 in Block

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37 of the townsite of Helena, County of Lewis and Clarke, Montana, and to nullify a deed issued by the probate judge of the said County of Lewis and Clarke to the plaintiff in error in the year 1888 for said Lot 31.

The amended complaint avers that in the year 1874 the defendant in error became the owner of said lots 17, 18, 19 and 20, in Block 37, and that he has possessed the same, as well as Lot 37, adversely since and until the commencement of the action, his title coming directly or through mesne conveyances from the probate judge of the said county, to whom a patent for certain tracts including the lots in question was issued June 15, 1872, pursuant to the laws of the United States concerning the reservation and sale of townsites on the public lands.

He further avers that these lots had in fact an aggregate frontage of one hundred sixty-one feet instead of one hundred thirty-seven feet as designated by the calls in the deeds and by the official plat.

In the year 1888, the probate judge issued to the defendant in error a deed for Lot 31 in Block 37, which said lot comprised the excess above mentioned—a new plat of the townsite having been made, upon which this lot appeared for the first time.

See first amended answer—

Transcript, Page 7, Folio 14.

The complaint further alleges that in the year 1873, one R. S. Hamilton, the grantor of the defendant in

error, recognizing that the lots as actually occupied and possessed by him had a greater frontage than his deeds called for, applied to the probate judge to purchase the excess as a separate lot, and paid the purchase price of the same, though it appears no deed was issued to him. Upon this showing he sought the relief indicated.

Transcript, Pages 8 to 11.

The answer, while admitting the adverse occupancy, denies that the defendant in error is the owner of any portion of the premises. He avers that on the 2nd day of March, 1869, the probate judge of Lewis and Clarke County, Montana, entered certain tracts of land as a townsite, pursuant to the laws of the United States; that at the time of the making of the said entry, the plaintiff in error was the owner of a placer mining claim within the exterior boundaries of the tracts so entered by the probate judge, which mining claim had theretofore been located pursuant to the laws of the United States and the local laws and customs of miners, and pursuant to the rules, regulations and laws of the mining district in which the same was situated; that the ground so located contained, at the time it was located and at the time of the entry by the probate judge, and still contains valuable deposits of gold; that from the time of its location until after the time of the entry of the probate judge it had been worked by the plaintiff in error and his predecessors in interest, who during all of said period were in the occupancy and possession of the same and were

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engaged in extracting the gold from the said claim, and that the said mining claim embraced within its exterior limits all the ground claimed by the defendant in error in his complaint. He accordingly avers *"that at the time of the said entry of the said townsite, he had a valid and subsisting mining claim to all the ground so located, embracing all of the premises claimed by the plaintiff in his complaint, which said ground was then a mine of gold, by reason whereof the title to the same remained in the United States subject to the right of the defendant herein to acquire a patent thereto agreeably to the laws of the United States."*

He further avers that having, after the entry of the townsite, left the State of Montana, leaving his mining claim in charge of an agent, the defendant in error without any attempt to acquire title to the same under any of the laws of the United States pursuant to which title might be acquired, entered upon so much of his mining claim as the said defendant in error claims in his complaint, which he continues to occupy and from which he excludes plaintiff in error; that other parties have in like manner intruded upon and occupy the remainder of his claim and exclude him from it; that these parties prevent him from going into possession for the purpose of resuming work upon his claim to preserve it from forfeiture and to enable him to obtain a patent to it; and that with a view to getting into possession for that purpose he

applied to the probate judge for and from him obtained the deed to Lot 31 referred to in the complaint.

He asks that the complaint be dismissed and that he be put into possession, and that the defendant in error be enjoined from interfering with his possession or with his doing such work as may be necessary to enable him to obtain a patent.

Transcript, Pages 11 to 14.

Upon this answer, a motion for judgment on the pleadings was made.

Transcript, Pages 14 and 15,

which was granted and judgment entered as prayed in the complaint.

Transcript, Page 15.

While the motion for judgment was under advisement, the defendant in error took leave to amend his complaint by averring the fact and date of the issuance of patent to the probate judge, and upon the court's ruling, the amendment was made. At the same time the court denied the application of the plaintiff in error to amend his answer by averring that all the deeds issued by the probate judge to the defendant in error and his predecessors and all other parties who appropriated the plaintiff in error's mining claim, contained the following provision, to wit: "*This conveyance is made subject to the bona fide rights of miners possessed of mining ground within*

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the limits above named (the premises granted by such deed) on the 26th day of February, 1869."

From the judgment entered in the District Court an appeal was taken to the Supreme Court of Montana.

Transcript, Page 33,

by which court the judgment was affirmed.

Transcript, Pages 36 to 38,

and the cause is brought here on a writ of error.

Transcript, Page 39.

II.

ASSIGNMENT OF ERROR.

The plaintiff in error assigns that it was error to grant the motion of defendant in error for judgment on the pleadings and to render judgment against him without a trial and that the Supreme Court of Montana erred in affirming such action.

The error assigned appears upon the face of the record.

III.

ARGUMENT.

The legal proposition presented by this record was adjudicated by this court in favor of the contention of the plaintiff in error in

Deffeback vs. Hawk, 115 U. S., 392.

Unless this court shall overrule that case the judgment herein must be reversed.

In that case this court held that a *patent* to a probate judge under the provisions of the laws of the United States for the Reservation and Sale of Townsites on the public domain is "*inoperative as to all lands known at the time to be valuable for their minerals, or discovered to be such before their occupation or improvement for residences or business under the townsite title*"; and this by virtue of the express provisions of the law relating to the disposition of lands for townsites as follows:

> "No title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws."
>
> R. S. U. S., 2392.

The mining claim of the plaintiff in error, held and worked by him at the time of the entry, was excepted from the patent to the probate judge for the townsite of Helena, just as effectually and in the same manner as though it were described therein by metes and bounds and specifically reserved from the grant. The probate judge got no title to it by virtue of his patent, and could, of course, give title to no one by his deed. The title to the ground embraced in the "valid mining claim" of the plaintiff in error, possessed and worked by him as a mine of gold at the time of the entry of the townsite, either still remains in him, or in the United States, if, by for-

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feiture or otherwise, he is unable now to assert his original right. The United States never patented it to the probate judge of Lewis and Clarke County nor to any one else.

The principle of the decision in Deffeback vs. Hawk has been repeatedly applied by the supreme court of Montana, before which tribunal, under both the territorial and the state government, it has become the settled law that every valid mining claim existing within the exterior limits of a townsite at the time of its entry is expressly expected from the operation of the townsite patent, and that it is not possible by such a patent to obtain any interest or title thereto.

Silver Bow M. & M. Co. vs. Clark, 5 Mont., 378;

Talbot vs. King, 6 Mont., 76;

Butte City Smoke House Lode Cases, 6 Mont., 397;

King vs. Thomas, 6 Mont,, 409.

These cases never came before this court for determination, but the conclusion reached in them was approved in the case of

Davis vs. Wiebold, 139 U. S., 507,

and the opinions written in them referred to as "very able and learned."

In the Montana cases above referred to, a patent had been issued to the probate judge for the townsite of Butte. Within the boundaries of the lands so granted there were at the time of the entry of the townsite, valid mining locations, among others the Smokehouse and the Pawnbroker lode claims. Notwithstanding the fact that the ground so covered by the said locations had been in terms conveyed by patent to the probate judge with other lands, the land department, on a showing that these mining claims had been located prior to the entry by the probate judge, issued to the owners patents for the same, and the actions above referred to were in the nature of ejectment brought by the mineral claimants or their grantees against the grantees of the probate judge to recover from the latter the possession of portions of the ground held by them within the limits of the mineral patent.

In view of the express and unusual approbation given by this court to the opinions filed in those cases, the plaintiff in error ventures to quote with some freedom from them.

The decision of the court was put upon two grounds:

(1) That the land was already granted to the miner when he located it as a mineral claim, and that the subsequent grant to the probate judge was so far void.

(2) That a valid mining claim existing at the time of the entry of the townsite was excepted out of the town-

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site patent, as if it were reserved by metes and bounds, and never was granted or attempted to be granted to the probate judge.

In elucidation and support of the first ground upon which the court rests its decision, the following language is quoted from

Steel vs. Smelting Co., 106 U. S., 450.

> "If the lands were never the property of the United States, or if no legislation authorized their sale, or if they had been previously disposed of or reserved from sale, the patent would be inoperative to pass the title, and objection to it could be taken on these grounds at any time, and in any form of action. In that respect, the patent would be like the deed of an individual, which would be inoperative if he never owned the property, or had previously conveyed it, or had dedicated it to uses which precluded its sale."

Smelting Co. vs. Kemp, 104 U. S., 644;

Patterson vs. Winn, 11 Wheat., 380;

U. S. vs. Tichener, 12 Fed. Rep., 415;

New Orleans vs. U. S., 10 Pet., 662;

Richards vs. Felps, 6 Wall., 160;

Best vs. Polk, 18 Wall., 112;

Stoddard vs. Chambers, 2 How., 284;

Polk's Lessee vs. Wendell, 9 Cranch, 99.

And thereto the court adds the following comment:

> "Before the patent for the townsite had issued, the Pawnbroker mining claim had been granted and sold, and thereby withdrawn and taken from the public lands, and the executive officers, therefore, had no authority to include in the townsite patent lands so disposed of, and if the townsite patent includes such lands, and the fee thereof, as appellants contend, it is so far and to that extent void."
>
> *Silver Bow M. & M. Co. vs. Clark*, 5 Mont. 421-422.

The views of the court concerning the second proposision supporting its conclusion in the cases referred to, may be gathered from the following extracts from the opinions:

In *Silver Bow vs. Clark*,

as follows:

> "If no title can be acquired to a mining claim or possession by virtue of the townsite act, then the defendant herein, who claims by virtue of a subsequent townsite entry and patent, cannot disturb the possession of the plaintiff, who claims by virtue of a prior valid location and patent of the mining claim in question."
>
> 5 Mont., 416;

and, in the same case, speaking of the claim that the mining claimants were estopped by the issuance of the townsite patent and that that was the time for them to be heard, the Court says:

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"Their mining claim was excluded from the operation of the townsite act. The law did not require any such action on their part, for they had no adverse claim."

5 Mont., 417.

The same idea is asserted in

Talbott vs. King,

as follows:

"The townsite patent takes hold of and conveys title to the lands within its limits, except the mines and mining claims and possessions therein, in trust for the occupants thereof, for town purposes, while the mining claim patent only affects the ground within which there has been a discovery and location according to law."

6 Mont., 102.

In the Smokehouse cases it is said to have been determined in the foregoing

"that it is impossible, under a patent to a townsite, to acquire any interest in any mine of gold, silver, cinnabar or copper, or in any valid mining claim or possession, held under existing laws; that, as to any such mining claim or possession, a patent to a townsite did not take hold of, operate upon, or in any manner affect it."

6 Mont., 400-401.

In the same case the Court says:

"The theory of appellants seems to be that the townsite patent conveys all the ground included within the boundaries of the townsite, regardless of prior conveyances to other parties; * * * that the words in the patent excluding from its operation all mines, mining claims and possession held under existing laws, was not an exception that excluded any lands from the Butte townsite."

6 Mont., 401.

Concerning this theory, the Court expresses itself as follows:

"Their patents do not cover or touch the same property. By the express terms of the law, and by the express terms of the townsite patent, all valid mines, mining claims and possessions held under existing laws were excluded from the operation of that patent. At the time of the issuance of the townsite patent in 1877, the Smokehouse location had, for more than two years, been a valid mining claim and possession. * * * The Smokehouse location, being a valid mining claim at the time, was expressly excepted from the operation of the townsite patent, and it was not possible by such a patent to have obtained any interest or title thereto. There is no conflict between a townsite patent and a mining claim patent, and can be none. They evidence separate and distinct grants, and cannot conflict with one another. The one conveys a mining claim, an independent grant, and the other conveys ground for a townsite, from which, by the law, all valid mining claims and possessions are excluded. Many valuable mines, mining claims and possessions are held and owned by perfect titles, over which townsites have been extended, and there can be no conflict between

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> them. The two titles take hold of and affect property that is entirely separate and distinct."
>
> 6 Mont., 402–403.

And in the same case, concerning language used by Justice Field, in Deffeback vs. Hawke, the Court says:

> "That is equivalent to saying what we have already said in this decision, that the townsite patent took hold of the non-mineral lands included within its limits, but did not touch or in any manner affect the mining claims therein; and hence that the patent to the Butte townsite did not affect the Smokehouse location; and, further, that there is not and cannot be any conflict between a townsite and a mining claim patent."
>
> 6 Mont., 408.

The learned district judge before whom this cause was first heard, recognized that if the doctrine of the Pawnbroker and Smokehouse cases stood, the motion for judgment on the pleadings must be denied. He seems to have entertained the view, however, that the supreme court of the state would be constrained by reason of the decisions of this court in

Davis vs. Wiebold, 139 U. S., 528, and

N. P. R. R. Co. vs. Barden, 154 U. S., 288,

to recede from the position taken in those cases.

Transcript, Page 31.

He ventured, accordingly, to consider the question as an open one, and wrote an able opinion, attacking the conclusion of the court so far as it was based upon the first ground referred to, but which, it must be said in fairness, left the second ground altogether untouched.

This opinion was incorporated in the one filed by the supreme court in affirming the judgment, and is found in the

Transcript, Pages 19 to 33.

Intervening the time, however, between the filing of this opinion in the district court and the hearing of the cause in the supreme court, after the state had been admitted, the supreme court of Montana reaffirmed the Smokehouse cases in

Chambers vs. Jones, 17 Mont., 156.

The opinion of the district court filed upon the motion for judgment,—briefly expressed—maintains that the patent to the probate judge granted to him all the ground within its limits,—that portion which was embraced within valid mining claims, as well as that which was occupied by townsite claimants and unoccupied portions confessedly non-mineral; that the mineral claimants were called upon to oppose before the land department the application for patent to the probate judge, and that the issuance of the patent was a conclusive adjudication that no such claims existed and that all the land within the grant was non-mineral, or, in any case, that the only

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relief the mineral claimant was entitled to was to maintain an action in equity within the period of the statute of limitations to have the probate judge decreed to hold that portion of his grant included within the mining claim as trustee for the mining claimant.

It will be observed that no one of these contentions was overlooked by the able counsel who argued the Smokehouse and Pawnbroker cases for the townsite claimants, chief among whom was the Hon. Hiram Knowles, since the admission of the state United States District Judge for Montana, nor by the court in the elaborate opinions filed in the early cases.

The view of the law taken in those cases was accepted not only by this court, but by all the local courts having had occasion since to consider the questions involved.

The supreme court of California applied the law as it was declared by them in

Richards vs. Dower, 81 Cal., 44.

It was approved by the supreme court of Arizona in

The Tombstone Townsite Cases, 15 Pac., 26,

and it was adopted by the Court of Appeals of Colorado in

Moyle vs. Bullene, 44 Pac., 69.

The leading writer on mineral lands, who has considered exhaustively the effect of the issuance of patents under the laws of the United States for portions of the

public domain, considers it as a settled proposition that a mining claim which exists within a patented townsite at the time the patent is issued,—by relation, the time of final entry—, does not pass by the patent, and that the mining claimant may defend in actions at law against the townsite title by showing the existence of such claim.

Lindley on Mines, 177.

In Davis vs. Weibold, and Richards vs. Dower, the mining location had not been made until after patent, but it was maintained that the ground embraced in the location was a "mine", within the meaning of Sec. 2392, R. S. U. S.

The court held in both instances that the ground in question was not reserved from conveyance by the patent unless it was known to be valuable for the mineral at the time of the townsite entry.

No such question arises in this case. Here the plaintiff had at and before the entry of the townsite a valid mining claim from which he was at the time of the entry actually engaged in extracting gold.

It would seem, in view of this state of the law, and particularly in view of the re-affirmation of the doctrine of Deffeback vs. Hawk in Chambers vs. Jones, after the decision by this court in Barden vs. Northern Pacific Railroad Company, that there was no course open to the

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supreme court but to reverse the judgment, yet without even a reference to the decision of the court made scarce two years before, when they said "It does not seem to us to be profitable to re-enter the discussion of the Smoke-house cases; they decide the questions of law involved in this case," the judgment is affirmed upon the opinion filed in the trial court, with the additional suggestion that the plaintiff in error has "disconnected himself from the United States," and is guilty of laches in permitting the defendant in error to remain in the possession of the premises for fifteen years or more.

It must not be forgotten that this action was brought by the defendant in error, the plaintiff below, to quiet *his* title to the premises. He is the actor, not the plaintiff in error. The plaintiff in error denied his title, though admitting that he and his predecessors obtained deeds for the premises from the probate judge under the patent of the latter, and that they occupied the premises as averred, but he avers that by reason of the existence of his mining claim at the time of the entry of the townsite, the probate judge never got any title to that part of the ground embraced within the exterior limits of the townsite, which was also included in plaintiff in error's mining claim; that the title to the part of the ground embraced within the limits of the townsite never passed from the United States, and that defendant in error, con-

sequently, could not possibly acquire title to it by operation of any state statute of limitation or adverse possession, by reason of which considerations defendant in error had no title which could be quieted.

The plaintiff in error asked some affirmative relief, that he be put into possession so that he might make proof and obtain a patent for his mining claim.

It might with some force be argued that, as to this affirmative relief, the plaintiff in error's laches and the fact that he had "disconnected himself from the United States," (as to which more will be said hereafter), bar him from from this relief; but such facts could not possibly serve to take the title out of the United States and vest it in defendant in error. *He must recover on the strength of his title, not on the weakness of the plaintiff in error's.*

On the conceded facts shown by the record we insist that the title to the premises in question is absolutely in the United States or is in the United States subject to the right of the plaintiff in error to the possession of the same, and the right in him to obtain a patent for the same. And in either case, it was error in the court to adjudge that the defendant in error is "the owner of the premises described in the complaint."

A plaintiff in a bill to quiet title must show that he has the title.

Kennedy vs. Elliott, 85 Fed., 832-835.

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So in actions, equitable in their nature under state statutes to quiet title, as in ejectment, the plaintiff must recover on the strength of his own title, not on the weakness of his adversary's.

Frost vs. Spitley, 121 U. S., 552;

Holland vs. Challen, 110 U. S., 15;

Schlosser vs. Crookshank, 65 N. W., 344;

Blodgett vs. McMurtry, 57 N. W., 985 (Neb.);

Jackson vs. LaMoure Co., 46 N. W., 449 (N. D.);

City of San Francisco vs. Ellis, 54 Cal., 72;

Hart vs. Bloomfield, 5 So., 620 (Miss.);

Ricks vs. Bastell, 8 So., 514 (Miss.);

Chiles vs. Champenois, 69 Miss., 603;

McCauley vs. Ohenstein, 62 N. W., 232;

Ordway vs. Cowles, 45 Kan., 447;

Dick vs. Foraker, 155 U. S., 404–414;

Kitts vs. Austin, 83 Cal., 167;

Henry vs. Pesoli, 109 Cal., 53;

Wood vs. M. K. & T. Ry. Co., 11 Kan. 323;

Ency. of P. & P., 300–361.

In Heney vs. Pesoli, supra, the court says,

> "We do not doubt but that in an action to quiet title the burden rests upon the plaintiff to show title in himself, and if he fails to make out a case he is not entitled to recover."

Wood vs. Railway Company, above cited, is a pertinent case. That action like this was brought under a statute to quiet the plaintiff's title. He had settled upon lands with a view to acquire title under the pre-emption law. The title to the land in question was not subject to acquisition under the pre-emption law. It was held that he could not maintain an action to quiet title, having no title to quiet.

After reaching the conclusion that the plaintiff could not acquire title to the lands in question under the law upon which he founded his right to them, the court continued:

> "He is therefore, as we have before said, merely a trespasser upon government land. Can such a person maintain an action to quiet his possession against some person who has no interest in the land, but claims that he has? We think not. * * * 'The plaintiff must show some right in himself, and some injury to that right by another, before he can subject him to the costs and vexations of a law suit.' (5 Kas., 27.) And this is good law, and applicable to this case. It has never yet been decided by this court that a mere trespasser without color of right or title can maintain an action to quiet title or possession. Possibly however such a person may in some cases maintain such an action. A mere tres-

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passer without color of right or title, who has been in the actual possession of real estate for fifteen years, claiming title thereto, becomes the owner of the property by virtue of the statute of limitations, if the property has been owned during all that time by some individual or individuals, *and not by the United States.* (Gen. Stat., 633, code, §16, subdiv. 4.) Mere possession therefore of lands to which the government has parted with its title, for any period, however short, with a claim of ownership, may be said to be an incipient or inchoate title, for such a possession will in time ripen into a complete, perfect and absolute title. And it may be that a person with such a possession may maintain an action to quiet his possesion, or for injuries thereto against any person who has not a paramount right, and who may claim adversely to him, or who may disturb his possession. But this can never be so where the government owns the real estate in controversy. The statute of limitation never runs against the government. (Lindsey vs. Miller, 6 Peters, 666; Gibson vs. Choteau, 13 Wall., 92, 99.) Therefore no trespasser can ever obtain any rights upon government land. And no decision of any state court under the laws of the state can ever possibly give him any such rights. He may occupy the land a hundred years, and have a hundred decisions in his favor, and still the right of the government will be as absolute as ever. He may quiet his title and possession against every person in the known world, and still he has obtained nothing. The government may still sell to any one of these persons as freely as to him, and any one of them has the same right to purchase from the government that he has. And no length of time in which he may be in possession of the land will shorten the time in which the government has the right to assert its title or claims thereto, or in

which it may sell to others, or in which these others may purchase from the government. A decision therefore quieting title to government land, being absolutely nugatory, it can hardly be supposed that our law-makers ever intended that such a decision should ever be made. But even if they should so intend, and pass a statute accordingly, the statute would be void. It is not necessary to examine to see whether the defendants own the land in controversy or not."

If the view of the supreme court of Montana expressed in its opinion in this case is correct, that the plaintiff in error has lost his rights in the premises in question by laches or otherwise, then the title is unquestionably in the United States, as such title, on the admitted facts, never passed from it.

It has been held that one in possession of a part of the public domain will be held to be the true owner as against a mere trespasser. But so is the occupant of any real estate.

The doctrine that the occupant of public land is presumed to be the owner as against a trespasser was never carried to the extreme, even before the passage of the statute of 1885 making it unlawful to enclose the public domain, referred to in Kitts vs. Austin, supra, of holding that one in possession of a portion of the public domain, himself having made no effort to obtain title to it under any law of the United States permitting him to do so, can maintain an action to quiet his title, as against one who seeks to acquire title from the government pursuant

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to its laws for the disposition of lands of the character of those in controversy.

Indeed the very contrary of this has been expressly adjudicated.

Brandt vs. Wheaton, 52 Cal., 430.

It must not be overlooked that it is expressly averred in the answer that the plaintiff in error entered upon the premises and has occupied them without any intent or attempt to acquire title to them under any laws of the United States pursuant to which they might be entered,

Transcript, Page 13,

relying, evidently, on his claim of title deraigned through the probate judge.

Without such intention, particularly in view of the act of 1885, before referred to, his occupancy and possession clearly gave him no rights whatever.

Buxton vs. Traver, 130 U. S., 232;

Northern Pacific Ry. Co. vs. McCormick, 89 Fed., 659.

———o———

It need not be added that if the probate judge got no title to the ground embraced in the mining claim of plaintiff in error at the time he made his entry, he acquired none by any subsequent abandonment or forfeit-

ure of such mining claim. His grant was fixed at the time it was made—the date of entry—and by the conditions then existing. If a "mine" had existed before the entry but had been worked out, or a mining claim had been staked and theretofore were abandoned or forfeited, the grant to the probate judge would include it.

Richards vs. Dower, 81 Cal., 44.

On the contrary if the "mine" or the mining claim existed at the time of the entry, the subsequent exhaustion of the one or the failure of the other would not operate to extend the grant to the probate judge over it.

Hermocilla vs. Hubbell, 89 Cal., 5;

Barden vs. Northern Pacific Ry. Co., 145 U. S., 535.

———o———

The case has been thus far argued upon the assumption that the plaintiff in error had "disconnected himself from the United States government" and "stands in no privity with it." But there is no valid ground for holding that he has lost all his rights in the mining claim which he was working at the time the townsite was entered.

The defendant in error dates his rights from the year 1874.

The Act of Congress of May 10, 1872, provided as follows:

> " On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the *first day of January eighteen hundred and seventy-five*, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to re-location in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location."
>
> R. S. U. S. 2324.

Under the plain provisions of this statute, the owner of a mining claim who has failed to "represent" it, may, at any time before it shall have been re-located, return and resume work upon it, and be restored to all the rights in it which he originally possessed.

Morrison's Mining Rights, 67;

Lindley on Mines, 643;

Lakin vs. Sierra Buttes Co., 25 Fed., 337–343.

Forfeiture is not complete until some one else enters with intent to re-locate the property.

But the interest of the plaintiff in error could not be forfeited for failure to do the annual representation work while some one else was in possession of the property, and he was kept out. Such conditions are held to excuse the failure to do representation.

Utah M. & M. Co. vs. Dickert, 21 Pac., 1002;

Slavonian vs. Peraisch, 1 Mor. Min. Rep., 541;

Mills vs. Fletcher, 100 Cal., 142.

This is a matter of no importance, however, as no relocation has been made or attempted to be made.

Clearly the plaintiff in error has not "disconnected himself from the United States" by a forfeiture of his claim by failure to do the representation work.

But it is claimed that one may lose possessory rights in the public domain by abandonment as well as by forfeiture.

That a mere possessory right, or such a right as springs from mere possession of a portion of the public domain, may be lost by abandonment, there can be no doubt. The laws of the United States contemplate the acquisition of title to a mining claim without the claimant's having done any one or more of the acts necessary to make a "location."

Sec. 2332, R. S. U. S., provides as follows:

> "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter in the absence of any adverse claim."

A right initiate under this statute is of a nature so frail that any person making a location of ground embracing such a claim would hold it rather than he who took no steps to "locate."

So prior to the Act of 1872, or at least prior to the Act of 1866, the mining claimant's right originated solely in, if it did not rest wholly upon possesssion.

That such a right may be lost by abandonment is indisputable. But that a mining claim, validly located, importing a grant from the government, though on a condition subsequent, is lost by leaving it without the intention to return (for that is what abandonment means), is at least doubtful. One might leave his mining claim with a fixed determination not to return to it, nor to do any more work on it, and yet change his mind before the expiration of the year, or before any one else had re-located. It is said that abandonment operates instanter. If so, his right was lost when he left, he could not oust an intruder and he must relocate the ground, if vacant, or he will lose his rights should any one locate over him.

We do not think this is the law. It is inconsistent with the idea that the effect of abandonment is avoided if the claimant returns before any adverse right is initiated, and that thereupon his rights relate back to his original location and do not date only from the time of his reentry.

Tucker vs. Jones, 8 Mont., 225.

But these considerations are of no moment upon this record. Abandonment is not in the case. It is a question of intention and of act.

Two elements must exist to constitute an abandonment; the claimant must quit the premises, and he must leave with the intention not to return or make further claim on them. The important element is, manifestly, the intention with which he leaves.

In this instance not only does it not appear that the plaintiff in error left his claim with the intention not to make any further claim to it, but it is affirmatively alleged that he left it in the charge of an agent and that in his absence the defendant in error and others intruded upon his claim and have since continued to occupy it.

It has been expressly adjudicated that

> "lapse of time does not of itself constitute an abandonment, but that it is only a circumstance for the jury to consider in determining the question whether there was abandonment; or in other words, the question is one of intent."

Moon vs. Rollins, 36 Cal., 333.

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The opinion in this case is by Judge Sawyer and in it is quoted the language of Judge Field in Keane vs. Cannovan, 21 Cal., 293, as follows:

> "There are cases, undoubtedly, in which an abandonment may be inferred from the lapse of time, and the delay of the first occupant in asserting his claim to the possession against parties subsequently entering upon the premises. But in such cases the leaving the premises must have been voluntary, and *without any expressed intention to resume the possession.* In the case at bar, it appears that when Mondolet ceased to occuy in person the premises he left an agent in charge of them. *This circumstance is of itself sufficient to rebut the presumption of abandonment arising from the fact that he ceased to occupy them, and to render the question, whether in fact he did or did not abandon them, one for the consideration of the jury.*"

In the case of Moon vs. Rollins, it was further held that absence for a time longer than the period of the statute of limitations, even, did not of itself constitute abandonment, as to which the court says:

> "But if a party may return in five years, it is not apparent why he may not return in five years and one month or two months, unless an adverse possession has barred the right of entry. It is a question of *intention*, and has been so held over and over again, and *not* a question of *time*, except so far as the jury are entitled to consider lapse of time in connection with other circumstances of claim, or non-claim, and acts of ownership and dominion, or a want of such acts, for the purpose of ascertaining the intention."

To the same effect is

Beaver Brook Co. vs. St. Vrain Co., 6 Col. App., 130.

The supreme court of Montana has itself declared that abandonment is a question of intention and that mere lapse of time is not alone sufficient to establish abandonment.

Gassert vs. Noyes, 18 Mont., 216.

Except the pleadings admit that the party left without the intention to return, the question of a bandonment must be submitted to the jury for trial.

Hewitt vs. Story, 64 Fed., 510–533;
(Circuit Court of Appeals, 9th Circuit;)

Valcalda vs. Silver Peak Mines, 86 Fed., 90;
(Same court.)

Lindley on Mines, 643.

Accordingly there is no opportunity to say that the plaintiff in error has "disconnected himself from the United States." Certainly not by forfeiture, because there has been no relocation; and not by abandonment, because it not only does not appear that he left without intending to make further claim to the ground, but it affirmatively appears that his intention was to hold it.

But, as before stated, it is altogether immaterial whether the plaintiff in error has any longer any rights in the premises or not. If he has not, the ground belongs absolutely to the United States, and the decree is erroneous in adjudging that the defendant in error is the "owner of the premises described in his complaint and involved in this controversy."

———o———

As to the affirmative relief asked, it is respectfully contended that the law gives the plaintiff in error the right to re-enter the premises, to prosecute mining work upon them, and to obtain patent for his claim. If the contention is sound that the United States never passed the title to the ground embraced in this mining claim to the probate judge, it is subject to entry, and the defendant in error ought not to be allowed indefinitely to occupy the premises without any attempt to acquire the title from the government, and to prevent, for all time, anyone else from doing so. If this doctrine is sound, any portion of the public domain may be appropriated by any person who occupies it adversely as against citizens qualified to obtain title to it under the laws for the disposition of the public domain.

It cannot for a moment be doubted that though one should take possession of the claim of a homesteader and occupy it for the period of the local statute of limitations,

he would acquire no right as against the former unless he had proceeded conformably to the laws of the United States, by proper contest before the land office to forfeit the original claimant's right and to file on it himself, if he were qualified to do so.

The doctrine that the original claimant may return and repossess himself of public land which he formerly occupied under the laws for the disposition of the public domain, unless meanwhile some other person has initiated an adverse claim to the same land under those laws, is a general principle, recognized and applied in reference to all classes of lands by the courts and the land department.

It might be thought that the action of the plaintiff in error in applying for and obtaining a deed from the probate judge for Lot 31 on his return, finding the defendant in error in possession, was estopped to question the transfer of the title by his patent to the probate judge. But this feature of the case was likewise determined in the Smokehouse cases.

In *Talbott vs. King*, 6 Mont., 76,

the townsite claimants offered

> "to prove that the former owners of the Smokehouse claim, and while so owners thereof, and knowing that said claim would be within the boundaries of the proposed townsite of Butte, joined others in petitioning the probate judge to enter said townsite for a patent, and in accordance therewith the townsite

was patented, and the owners of the Smokehouse claim accepted from the probate judge deeds to lots on said claim; and that these owners declared that they would not interpose or assert their title to this mining claim or any rights thereunder, as against the townsite patent, or those claiming under the same."

This offer was rejected, and in affirming the action of the lower court the supreme court of Montana said:

"No one could have been deceived by the act of the owners of the Smokehouse claim in signing a petition for, or taking an active part in procuring the townsite patent. And if such owners accepted deeds from the probate judge for lots included within the Smokehouse location, they received deeds for land that they already had a title to, and no one was deceived or injured thereby. And if they declared that they would make no claim by virtue of their Smokehouse location, still the location remained a valid mining claim, to which the appellants and no one else could acquire any title by virtue of the townsite patent. Their declaration did not repeal the act of congress, which declares that no townsite patent shall convey any interest in or to any mine, mining claim, or possession. It did not change a valid mining claim into a townsite. It did not authorize to be done what the government under the law could not do; and it does not appear that the appellants were, in any manner, induced to act upon such declarations to their injury or otherwise. It does not appear that one solitary act has been performed by any one in consequence of these declarations, nor that they were made with the intent that any one should act upon them."

It seems probable that the apparent inequity of the case of the plaintiff in error and the disposition not to disturb titles long considered settled, constrained the supreme court of Montana to overlook the principles of the law applicable to townsites on the public domain which its own decisions contributed so largely to establish, in reaching the conclusion it did in this case. The judgment should be reversed and the cause remanded with directions to proceed to trial on the answer interposed by the plaintiff in error.

Respectfully submitted,

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No. 177.
Reply Brf. of Walsh for P. E.

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OCTOBER TERM, 1899.

No. 177.

PATRICK MORAN, PLAINTIFF IN ERROR,

vs.

JOSEPH HORSKY, JR., DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFF IN ERROR.

THOMAS J. WALSH,
Counsel for Plaintiff in Error.

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The following considerations and authorities are submitted in reply to the brief of defendant in error:

I.

As to jurisdiction.—The argument seems to be that there are two questions involved in the determination of the court below, the one Federal and the other not Federal, and that the decision either rests on the latter or on both. The question not Federal is said to be laches.

The supreme court declared that it adopted the view of the lower court on the status of the plaintiff in error, which, it says, is that he had "disconnected himself from the

United States Government" by permitting the defendant in error for twenty years to occupy the premises. Those circumstances, they say, make it a proper case to apply the doctrine of laches.

It will be observed that the supreme court simply adopts the views of the judge of the lower court on this branch of the case.

The defendant in error, in the brief, also introduces his remarks upon this subject by referring to the language of the trial judge concerning the laches of the plaintiff in error.

It is important, accordingly, to inquire what the trial court had to say on the subject of laches.

The trial court understood our contention thoroughly. He understood that we were contending that the plaintiff in error's mining claim was excepted out of the patent to the probate judge, was not conveyed by it at all—was excluded from it.

He admitted that if this view was correct no statute of limitations would be operative against us. This is his language:

"In this action the defendant Moran contends that the mining claim, located prior to and in his possession at the date of the application for the Helena town site, was absolutely excluded from and that the title thereto did not pass under the United States patent to the probate judge for said town site. If this premise is conceded, it necessarily follows that the plaintiff has gained no right by adverse possession to the lot of land in controversy, because the legal title to the same is still vested in the United States."

He denied our contention, however, and maintained that the patent to the probate judge in fact and in law conveyed to him every foot of ground within its boundaries, whether the same had been at the time of the entry covered by valid mining claims or not.

He then maintained, as a necessary deduction from that

conclusion, that the only remedy the plaintiff in error ever had since the issuance of the patent—by which the legal title, he maintained, to everything had passed from the Government of the United States—was either by a bill in equity to have the probate judge decreed a trustee in his interest for so much of the grant as was embraced in the plaintiff in error's mining claim, or to procure the United States to institute an action in equity to annul the patent as to such part of the grant, and the court held that he could pursue neither of these remedies because his laches barred him from both.

Transcript, 32, 33.

The course of reasoning is absolutely logical and the conclusion indisputable. If you grant that the title passed from the United States to the probate judge, then the statute of limitations and the law of laches may begin to operate; not before. But that is the question. Did the title pass or was this ground excepted out of the grant so that in the language of the law "no title" could be acquired to it?

Reference is made to the concession made by Judge Buck to the effect that if the mining claim of plaintiff in error was absolutely excluded from the grant to the probate judge the defendant in error could acquire no rights in the premises nor the plaintiff in error lose any by adverse possession. The same frank admission was made by Judge Knowles in the Butte town-site cases. Indeed, he argued unanswerably that if the theory of an absolute exclusion was maintained no occupancy, however long maintained, would give the occupant any rights nor deprive the mineral claimant of any.

5 Mont., 391, 392.

It needs no argument to demonstrate that if the laws of the United States prevent the application to the case of the State statute of limitations and adverse possession, they equally forbid the application of the law of laches.

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The legal principle that the statute of limitations will not begin to run while the legal title is in the United States is a deduction from the maxim that laches is not to be imputed to the Crown. So often has this been declared by this court that no specific reference is necessary.

Courts of equity apply statutes of limitations as well as courts of law; but often when the full period of the statute of limitations has not yet run, courts of equity apply the doctrine of laches. It is a plea of the same kind, only weaker.

It follows that if to apply the statute of limitations to a given case would be an interference with the right of the Government to the primary disposal of the soil, it would be equally such an interference to apply the doctrine of laches.

The plaintiff in error claims the right under section 2324, Revised Statutes of the United States, and other sections of the chapter in which it is found, to go into the possession of the premises in controversy and to obtain a patent for them. The judgment has denied him this right.

In the celebrated case of Gibson *vs.* Choteau, 13 Wall., 92, jurisdiction was taken by this court because the State court had applied the statute of limitation while the legal title was in the United States, and concerning the right of primary disposal it was in that case said:

"That power cannot be defeated nor obstructed by any occupation of the premises before the issue of the patent, under State legislation, in whatever form or tribunal such occupation be asserted."

In Oaksmith *vs.* Johnston, 92 U. S., 343, is found the following pertinent language:

"The legal title being in the United States, the statute of limitations raises no bar to the action. Mere possession of the land, though open, exclusive, and uninterrupted for twenty years, creates no impediment to a recovery by the

Government, and, of course, none to a recovery by one who within that period receives its conveyance.

"In Burgess *vs.* Gray, 16 How., 18, the plaintiff and those through whom he claimed had been in possession of the land for which the action was brought for more than half a century, and among other grounds he relied upon this long-continued possession to recover against defendants, who entered under title derived from the United States. But the court said: 'The mere possession of public land without title will not enable the party to maintain a suit against any one who enters on it; and more especially he cannot maintain it against persons holding possession under title derived from the proper officers of the Government. He must first show a right in himself before he can call into question the validity of theirs.'"

It has been repeatedly determined that where title is claimed under an act of Congress, and the highest court of a State rules against the title so asserted, the decision may be reviewed by this court.

Pollard *vs.* Kibbe, 14 Pet., 353.
Lytle *vs.* Arkansas, 22 How., 193.
Berthold *vs.* McDonald, 22 How., 334.
Silver *vs.* Ladd, 6 Wall., 440.

II.

Law of the case.—The brief of defendant in error is in great confusion upon this point. The original answer of the plaintiff in error did not even mention his mining claim. It claimed *under* the probate judge, not *in hostility* to him. It averred that the legal title had passed to the probate judge, who, it was maintained, held it in trust for him, as to lot 31, on which plaintiff in error had a dwelling at the time of the entry of the town site.

His answer, in addition, was, in substance, that no legal plat of the Helena town site was in existence until 1885, when the McIntire plat was filed, and that though lots similarly

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designated appeared on the Wheaton plat, filed about the time of the entry, they pointed out other places on the earth's surface. Certain denials and allegations were made concerning the defendant in error's claim of adverse possession. These the lower court held admitted the adverse possession, and the supreme court held did not. On appeal from a judgment rendered on the pleadings, the supreme court held that an issue had been raised as to the adverse possession, and that a trial must be had.

The defendant in error then amended his complaint, and the plaintiff in error filed an answer to the amended complaint, with allegations as set out in the original brief herein.

Counsel for defendant in error has fallen into a number of errors in regard to these pleadings. The supreme court did not hold on the first appeal that the statute of limitations was not well pleaded. It was held that the answer raised an issue as to that, and that a judgment on the pleadings should not have been granted.

There was no question on the first appeal as to "whether the adverse possession of respondent was valid as against appellant's claim to the same as mineral lands," as stated at page 9 of the brief. There was no mention in the answer which first went to the supreme court that the plaintiff in error ever had a mining claim.

The plaintiff in error did not amend his original answer by setting up "that defendant in error and others entered and held said premises under deeds from said probate judge, subject to the *bona fide* rights of miners," as stated at page 11 of the brief.

After the motion for judgment on the pleadings as they now stand was heard, plaintiff in error asked to make a further amendment, setting up the fact as stated, but the court refused to permit it.

Transcript, pages 17 and 18.

And this allegation is not found in the answer.

The difference between the answer on which the case first went to the supreme court and the one before the court on the second hearing is pointed out by Judge Buck in his opinion in the—

Transcript, page 20.

The court did not hold anything about the efficacy of the adverse occupancy of the plaintiff on the first appeal; but, if it did, it is quite immaterial. It seems to have been contended, or might have been contended, on the first appeal that as to lot 31, which came into existence as a separate lot by the McIntire plat in 1885, and possibly as to the others, on some ground on other, that the title remained in the probate judge, and that the statute of limitations did not run against him, as he was an agent of the Government. If the court did hold against this contention, it was probably right; at least, so we understand—

Ames *vs.* City of San Diego, 101 Cal., 390.

But to hold that the statute is applicable *after* the title has passed to the probate judge is not to hold that it is applicable *before* it passes or *if it has not passed.*

The amended answer raised an entirely new issue, and "the law of the case" is inapplicable.

Castagnino *vs.* Battela, 82 Cal., 250.

But if the questions were identical it would make no difference. The supreme court of Montana might not be able to again consider the question as debatable, but no such inability can possibly extend to this court; otherwise it never could review a Federal question which a State court ruled upon in reversing a case and remanding it for a new trial. It is urged that a State statute is contrary to the Constitution of the United States. The trial court

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sustains this position, and the supreme court of a State takes a contrary view, reverses the cause, and sends it back for a new trial. It comes up again, and the State court applies the rule of the law of the case and affirms the judgment, the trial court having obeyed the mandate. It is idle to urge that the "law of the case" prevents this court from considering the question, or that it is such a separate question as interferes with this court's jurisdiction.

A case exactly in point is Seidenbach *vs.* Riley, 111 N. Y., 560.

And the rule, from the necessities of the case, has no application to intermediate courts, which the supreme court of a State is, in a cause which may come to this court.

United States *vs.* Elliot, 12 Utah, 119–124.

III.

The issuance of the patent is an adjudication of the fact that the land was non-mineral and the claim of election and estoppel.

It will occur to the court as striking, to say the least, that on these two propositions, touching the merits of the controversy, and indeed throughout the brief, it is never even intimated that the direct question was before any court. The Pawnbroker and Smokehouse cases are nowhere mentioned. Chambers *vs.* Jones is not heard of and Deffeback *vs.* Hawke is altogether forgotten. We say here and we said in the supreme court of the State and in the district court, as will be noticed by Judge Buck's opinion, that these cases, save Chambers *vs.* Jones, not then decided, were directly in point and determined this case. It is not now and never has been asserted that they do not nor that the judgment can stand save that they fall; but the counsel spreads out at length in his brief identically the same argument that was made in the Butte town-site cases

for the town-site claimants by Judge Knowles except as to one matter. Judge Knowles recognized the important consequences flowing from the conclusion that the mining claim was excluded from the patent. He argued ably against that contention, and then proceeded to deduce that the remedy was in equity to declare a trust or annul the patent. His argument will be found in connection with the report of the case of Silver Bow M. & M. Co. *vs.* Clarke, 5 Mont., 378.

The counsel for plaintiff in error in this case jumps the first proposition. He assumes that the patent to the probate judge takes in everything, mining claims and all. He does not argue it; he says it does.

That is the question in the case. If that question is decided against us, we must admit about all the rest of his argument.

So it is with the argument on election and estoppel. Identically the same claim was made in the Smokehouse cases, as shown in our original brief, at pages 33 and 34.

Identically the same argument was made by Judge Knowles. He likewise cited a large number of cases on the law of election.

See 6 Mont., 86, 87.

But the conclusion does not rest on those cases alone. After the State was admitted the supreme court of Montana denied the efficacy of the same contention in—

Mayer *vs.* Carothers, 14 Mont., 274.

So as to the argument of the counsel founded on the case of Barden *vs.* N. P. R. R. Co., Although that case had not been decided, its reasoning was anticipated by Judge Knowles, as will be seen in—

5 Mont., 394, 395.

We have refrained from discussing the reasons for the conclusion that the town-site patent did not pass the title to the ground covered by the plaintiff in error's mining claim. It has been decided by the supreme court of Montana and by this court that it did not, and no one has yet advanced any reason that was not fully considered in the cases so decided.

But as much claim is made for Barden *vs.* N. P. R. R. Co. in its relation to Deffeback *vs.* Hawke, a word or two may be appropriately added.

By the act under consideration in the Barden case there was granted to the railroad company *each alternate section not mineral.* The grant was a float fixed by the filing of the map of definite location. The title passed to all lands not mineral; but it became necessary to determine which were mineral and which were not mineral. The court held that before issuing the patent the department was called upon to determine which were mineral and to issue patents for those and to say which were not mineral and to refuse to issue patents for those.

No such condition exists with reference to the issuance of a patent to a probate judge. As pointed out in one of the opinions, a rich mineral deposit is discovered, and immediately a town grows up around and above it. The probate judge applies for a patent to the whole region.

There is not a trace in the land office of any claim to it by any one. The notices of location are in the local county recorder's office, not in the land office. He is permitted to enter and patent goes, and the very law which gives him the patent says that no title shall be acquired by it to any valid mining claim or mining possession. How can such a proceeding be said to be an adjudication shutting out the rights of those holding mining claims within the limits of the patent, the law making no sort of provision even for notice to them?

There is no sort of conflict and can be no conflict be-

tween Deffeback *vs.* Hawke and Barden *vs.* N. P. R. R. Co. in view of the considerations adverted to and the essential difference in the statutes and the conditions attendant upon the issuance of patents under them.

It may be noted that the counsel never fails to say that the patent adjudicated that the land in question was non-mineral, as if that was our sole contention, while we stand not only upon the claim that the ground was mineral—a mine—but also that it was a valid mining claim and possession, and it is necessary to go further in order to defeat our rights, and hold that the patent adjudicated that we had no valid mining claim or possession at the time of the entry within its limits.

It may be considered of importance that the Land Department originally held that the patent to the probate judge conveyed everything within its bounds, and that by its issuance the department lost jurisdiction; that if any person claimed he had a mining claim within its bounds he might apply to the department to request the law department to institute suit to cancel the patent as to the interference.

But, controlled by the cases adverted to, it now recognizes that the patent, in the language of Deffeback *vs.* Hawke, "is inoperative" as to any mining claim existing at the time of the entry, and the application for patent to such claim is entertained without further formality, leaving the town-site claimants the right to try in the local courts the validity of the claim of the mineral claimant.

Pacific Slope Lode *vs.* Butte Town Site, 25 L. D., 518.

Some claim is made that the answer is defective as a pleading in not averring that the ground claimed by plaintiff in error contained such "an amount of minerals as to

be valuable for mining purposes." It will be observed that the answer follows the exact language of section 2392, R. S. U. S.

The counsel again loses sight of the fact that the statute does not say that no title shall be acquired under the town-site act to mineral lands, or that mineral lands shall not be subject to disposition under the chapter, but that no title shall be acquired to any "mine" or "mining claim or possession."

If the discovery and location were made after the entry of the town site the question urged would arise, not as one of pleading, but of proof. On this record it is not presented at all.

The brief offers no reason why the parties should not proceed to try the existence of the plaintiff in error's mining claim at the time of the town-site entry.

Respectfully submitted.

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No. 177.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1899.

PATRICK MORAN,
Plaintiff in Error,

vs.

JOSEPH HORSKY, Jr.,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

EDWIN W. TOOLE,
Attorney for Defendant in Error.

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Defendant in Error.

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ADDITIONAL FACTS.

It will be seen from the record that, at the trial of this cause, a motion for judgment on the pleadings was made (page 14); and later an amended motion for judgment on the pleadings was made, for the reason, among others, that the defense "is barred on account of the laches of said defendant" (p. 15), and that the motion was granted and judgment rendered accordingly.

The motion for judgment was not made alone upon the

last answer filed, as stated on p. 5 of the brief of plaintiff in error, but was upon the original pleadings which had previously been filed as well as two amended complaints and the two answers thereto. This will appear from the stipulation referred to below. The action had once before been tried, judgment rendered in favor of the plaintiff (defendant in error) upon the ground that the defense was barred by the Statute of Limitations.

The Supreme Court of the State reversed this judgment upon the ground that the statute had not been properly pleaded. Horsky v. Moran, 13 Mont. 250.

The motion for judgment on the pleadings was also based upon the remittitur from the State Supreme Court, which included the opinion of the Court under Rule XIV of the Supreme Court in force at that time, which is as follows:

"XIV.

REMITTITUR, WHEN ISSUED.

"Remittitur will, in cases where it is deemed proper, " be ordered forthwith on determination of appeal; other- " wise the same will be issued on application at any time " fifteen days thereafter, unless motion for re-hearing or " modification of judgment has been made.

"A copy of the opinion will accompany the remittitur " when the judgment or order of the trial court is re- " versed or modified and the case remanded for further " proceedings other than the entry of a final judgment or " order determining the proceedings in the trial court."

Neither the original pleadings nor the remittitur of the Supreme Court have been incorporated in this record, and

were not by counsel for plaintiff in error included in his bill of exceptions used on his appeal to the Supreme Court of the State of Montana; on the second trial in the District Court, that court had the judgment, the former pleadings and the remittitur as a part of its own records; on appeal from the judgment then rendered, it was stipulated that the pleadings in the transcript on the former appeal should be considered as a part of the transcript on the then pending appeal (see p. 35, see also p. 16), and, of course, the Supreme Court of the State had its own record of its decision and judgment.

None of these papers is in this record; it is difficult to see how they could now be made a part of the record, as they are not made a part of the bill ofexceptions or referred to therein, except as to the original complaint (p. 16). The pleadings, other than the original complaint and answer, are in the record. They speak for themselves. The motion was based upon them as an entirety, and counsel for defendant in error prefers not to select isolated portions of them.

Sections 29, 30 and 33, of the Code of Civil Procedure, Compiled Statutes of the State of Montana (which were the laws in force at the time of the trial of this cause, see page 14 of the record, in the motion for judgment) are as follows:

> "Sec. 29. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seized or pos-

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sessed of the property in question within five years before the commencement of the action.

"Sec. 30. No cause of action or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual unless it appear that the person prosecuting the action, or making the defense, or under whose title the action the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made.

"Sec. 33. When it appears that the occupant, or those under whom he claims, entered into possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument instrument as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there had been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property under such claim, for five years, the property so included is deemed to have been held adversely, except that, when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract."

ARGUMENT.

NO JURISDICTION.

We respectfully submit that this court has no jurisdiction to hear this case. The motion for judgment on the pleadings, among other reasons, assigned the following: "And for the reason that the same is barred on ac-

count of the laches of said defendant (plaintiff in error), as shown by the papers and proceedings aforesaid." Record, p. 15.

The trial court in disposing of the motion used this language: "The United States * * * and, under the authority of these last cited cases and numerous others, his self confessed laches, wholly unexplained, place him beyond the pale of any equitable relief either directly or indirectly through the intervention of the government." Record, p. 33. And the Supreme ourt of the State, in the decision from which this writ of eror is taken, bases its decision upon the ground of laches and no other, as will appear from the following language: "Although we put our affirmance of the judgment upon the ground of laches, a majority of the Court believe that the decision and reasoning of the trial court is the correct solution of the other questions discussed." Record, p. 38.

This language leaves no room for doubt that a majority of the Court, consisting of the Chief Justice and Associate Hunt, expressly puts its affirmance of the judgment upon the ground of laches, although a majority of the Court, consiting of Associate Justices Hunt and Pigott, concurred in the decision and reasoning of the trial court upon the other questions raised. In such a case there is a long and unbroken line of decisions of this court holding that there is no jurisdiction in the Supreme Court of the United States. In Eustis vs. Bolles, 150 U. S., 361, Mr. Justice Shiras announces the rule as follows:

"It is settled law that, to give this court jurisdic-

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tion of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. Murdock v. Memphis, 20 Wall., 590; Cook County v. Calumet & Chicago Canal Co., 138 U. S., 635.

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court willn ot review the judgment."

"In Klinger v. Missouri, 13 Wall. 257, 263, this court, through Mr. Justice Bradley, said: 'The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court

will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the state court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.'

"In Johnson v. Risk, 137 U. S. 300, the record showed that, in the Supreme Court of Tennessee, two grounds of defense had been urged, one of which involved the construction of the provisions of the Federal bankrupt act of March 2, 1867, and the other the bar of the statute of limitations of the State of Tennessee; and this court held that 'where, in an action pending in a state court, two grounds of defense are interposed, each broad enough to defeat a recovery, and only one of them involves a Federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon the disposition of the Federal question; and if this does not affirmatively appear, the writ of error will be dismissed, unless the defense which does not involve a Federal question is so palpably unfounded that it cannot be presumed to have been entertained by the state court.' "

This opinion is cited with approval in Harrison v. Morton, 171 U. S. p. 47, and Harrison v. Morton, supra. and Bacon v. Texas, 163 U. S. 228, are cited with approval in McQuade v. Trenton, 172 U. S. 640, where the court says:

"We have repeatedly held that even the decision by the state court of a Federal question will not sustain the jurisdiction of this court, if another question not Federal were also raised and decided against the plaintiff in error, and the decision thereof be sufficient, notwithstanding the Federal question, to sustain the judgment."

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This doctrine is quoted and approved in Allen v. So. Pac. Railroad, 173 U. S., 489, in which the court says:

> "Conceding *arguendo* only that the contentions thus advanced wiuld give rise to the Federal questions as claimed, it becomes wholly unnecessary to consider them if it be disclosed by the record that the state court rested its decision upon grounds wholly independent of these contentions, and which grounds are entirely adequate to sustain the judgment rendered by the State court without considering the Federal questions asserted to arise on the record."

From the citations above made to the record, embracing the motion for judgment on the pleadings, decision of the trial court, and of the Supreme Court of the State, it clearly appears beyond contention that a decision of the Federal question was not necessary to a determination of the cause, and that the judgment could have been and was rendered without deciding it.

While we are confident that this proposition is conclusive of this appeal and fatal to plaintiff in error, we submit the following argument in case the court should conclude to further consider the case on its merits.

POINTS.

First. The adverse possession set up by defendant in eror in his last amended complaint herein not being denied, he was entitled to judgment under the former decision of the supreme court of Montana as the law of the case.

Second. That the claim of plaintiff in error to the premises was barred by the adverse possession of defend-

ant in error and the laches of plaintiff in error as shown by the pleadings, on account of which defendant in error was entitled to the judgment rendered upon the motion.

Third. That plaintiff in error is bound by his election in obtaining a deed to said premises from the Probate Judge under the townsite patent, which occasioned this action, and cannot now asert his claim to the same as mineral land, for which reason defendant in error was entitled to the judgment rendered.

Fourth. That the *patent* to the Probate Judge of the townsite was conclusive evidence of the *fact*, under the pleadings in this case, that the premises were non-mineral at the time said patent issued, and therefore authorized the entry of judgment upon said motion.

I.

We shall take up the four propositions relied on in the order stated and briefly present what we have to say upon them.

As will be seen from the pleadings as they stood upon the former trial of the case in the District Court of the State and as they now stand on this appeal, the statute of limitations, if applicable on the former trial, is equally applicable here. Two of the main questions presented, were, whether the adverse possession of respondent of the premises under the townsite patent was valid against appellant's claim to the same as mineral lands, and if so, are the facts constituting adverse possession sufficiently set out in the complaint. The Supreme Court of the

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State on the first appeal held the plea of the statute of limitations to be material but that the facts alleged were insufficient, and reversed the case solely upon that ground. If the Supreme Court of Montana had considered the adverse possession sought to be set up unavailable it would have said so and not discussed the question of the sufficiency of the facts pleaded and remanded the case on that account. It would simply have said that the plea was not available no difference how complete the allegation of facts in support of it and thus disposed of the question. The doctrine announced in the former decision of this court is applicable here, and under it, the undenied adverse possession of respondent entitled him to pudgment, as the *law of the case* .

Clay v. Hoagland, 6 Cal., 685.

Brim v. Jones, 45 Pac , 46.

Table Mt. &c. v. Stranahan, 21 Cal., 548.

Hermann on Est. and Res. Adj., 117, Sec. 115.

It is fundamental that the principles of a decision upon a question of *law* or *fact* in a case are conclusive in that case wherever that principle of law arises, or wherever the same facts exist in all after proceedings. Here the Supreme Court of the State held as a matter of law that the adverse possession as alleged by respondent if well pleaded and established was valid against appellants alleged title to the possession as a mining claim. Apply the principles thus announced in the former trial to the

facts presented in this, and judgment for respondent was properly entered for the reasons above stated.

To meet this fatal condition of affairs plaintiff in error amended his answer and set up the additional fact that defendant in error and others *entered* and *held* said premises under deeds from said Probate Jundge subject to the bona fide rights of miners in existence at that time. While it will be seen that none of the *facts constituting the adverse possession* set out in the complaint are denied, it will be noted that the allegation in the answer refers to the paper title under which respondent held and not the claim he made to the premises constituting his adverse possession.

Now it has uniformly been held that this kind of a reservation in the patent to the Probate Judge as trustee for the occupants of lots is void and that he takes the title free of such reservation. The patent therefore conferred a title as if such reservation had not been contained in it. So it is with the deed through its agent the same principle would obtain. It is absurd to assume that this reservation is void in the patent as to the Probate Judge and not void as to those for whom he holds. It was declared void on account of the beneficiaries for whom he held, and as a protection to the *cestui qui trust* and not the trustee, who could convey no less or greater title than that conferred upon him. This being the case the defendant in error and his predecessors in interest were presumed to know the law, and their alleged adverse possession is consequently in accordance with

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both patent and deed when properly construed. Suppose no such reservation was contained in the patent to the Probate Judge, who, under the laws of the United States, holds for the occupants of the lots and is required under certain conditions to convey to them, and he should insert such a reservation in his deeds in discharge of his trust imposed by law, would any one doubt the invalidity of such a reservation? If the reservation in the patent is void would not the same principle apply? The inevitable conclusion is, that the *facts* constituting the adverse possession not being denied, and the new matter setting up that defendant in error held under a deed with such a reservation, *when legally construed* leaves the material facts of the former trial on all fours with this, and the principles there announced become the law of the case. To express it more pointedly defendant in error alleges that he claimed title exclusive of any other right, and this is just the kind of title the deed to him legally imports.

The land officers were the agents of the government in conveying the title by patent to the Probate Judge, and the law does not declare the patent void but declares the reservation void. The Probate Judge acts as the agent of the government in conveying to the occupants, and upon the same principle the deed is not void but the reservation in it is void. The ultimate object of the law is to confer title upon the beneficiaries under it. Hence, when it is alleged that respondent holds under a deed with such a reservation it is tantamount to saying that he holds under a deed conveying the fee, and this is exactly

in accord with the facts alleged in the complaint. And so it is, the former decision upon the legal question is the law of this case, and we insist upon the adherence to the doctrines which apply under such conditions. We venture the assertion that every owner of a town lot claims according to the legal effect of his deed with the void reservation eliminated just as the respondent does in his complaint

II.

Feeling so thoroughly convinced from an examination of the authorities, and upon principle, that the doctrine of the "law of the case" is conclusive of all that is in this appeal, we respectfully again present the question in this action as to the applicability of the statute of limitations. The allegation of facts constituting the adverse possession by the amended complaint conforms to the former decision of the Court and fully complies with the requirements of the Code of Civil Procedure. Should the Court consider it proper again to review the question *in this case* we respectfully submit the following points and authorities in support of the adverse possession of the respondent and laches of appellant.

It must be conceded that the right of the Probate Judge to the town site patent for the premises in suit depended upon the mineral or non-mineral character of the same, and it cannot be successfully claimed that in issuing the patent the land department had not the power to determine this question and that it was its duty to do

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so. It follows that under such circumstances the rights of the respective parties to a patent depending upon *this* question of *fact*, the patent, when issued, conveyed the legal title to the granted premises. To divest the grantee therefore of this legal title resort must be had to a court of equity, and even there if a recovery could not be had in ejectment no relief would be afforded. But it will be seen from the various pleadings contained in this record and the records on the former trial, which were part of the motion papers, that many years elapsed before plaintiff in error ever attempted to assert his claim to the premises as mining property in the very heart of the capital of the state. His laches under such circumstances preclude him from asserting any equity against the legal title conferred by the patent.

The patent to the Probate Judge is conclusive of all the facts necessary to justify the issuance of it, one of which is the mineral or non-mineral character of the land granted.

Green v. Barker, 66 N. W., 1032.
Drefus v. Badger, 41 Pac., 279. 108 Cal., 58.
Barden v. N. P. R. R. Co., 154 U. S., 288.
Irvine v. Tarbott, 38 Pac., 896. 105 Cal., 237.
Colburn v. Railroad Co., 13 Montana, 476.
Moore v. Railroad Co., 45 Pac., 215, 18 Montana, 290.

This question of fact, so determined, cannot be questioned collaterally and the patent title of defendant in error can only be reached by plaintiff in error by a suit in

equity to declare him a trustee, or by the United States to declare the patent void or limit its operation. In either case the insuperable barrier of the adverse possession of defendant in error and the laches of plaintiff in error would defeat a recovery.

Curtner v. U. S., 149 U. S., 662, 671.

If he had the legal title as he claims his cause of action acrued a quarter of a century ago; and equity will never afford useless and unavailable relief.

Yore v. Murphy, 45 Pac., 217. 18 Montana, 342.

Plaintiff in error does not claim under a patent so as to bring him within the rule that where two patents have been inadvertently issued for the same premises the courts will go behind the patents and inquire into the equities of the parties. He must rid himself of the result of the legal title conveyed by the patent and can do so only by resorting to a suit in equity, in which he would be met with intolerable laches.

III.

We shall briefly consider the third proposition involved in this contention. The doctrine of election is one of universal application, and wherever the facts warrant it the courts uniformally enforce it. It will be noted that plaintiff in error made his application to the Probate Judge for a deed to the premises in controversy on account of his patent to the same as a townsite; that his application was based upon his occupancy of the same as

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a fractional town lot, and that he made the necessary proof and obtained a deed for the premises and that this very deed invited all this litigation. Robert Hamilton, the predecessor in interest, however, of defendant in error, had paid for the fractional lot, and done all that was required of him to obtain a deed prior to the application of plaintiff in error, which deed was afterwards issued to defendant in error. These are undisputed facts. As a free moral agent and independent citizen he (plaintiff in error) had a right to renounce his mineral claim (if he had any) and elect to take under the townsite patent. This was done; and any one competent to transact business for himself was entitled to do so. By his election he caused this action and is bound by the steps thus taken. He cannot obtain a deed as a beneficiary under the townsite and then limit its operation, effect or purpose to matters that would have defeated him in obtaining it. He was at liberty to claim the premises either as a mining claim, bring his action to declare defendant in error a trustee, or renounce his mining claim and claim under the townsite entry; he chose the latter, and must abide by it. This right of election, when once exercised, cannot be defeated by an after thought, which might possibly be more to his advantage. When once made, the party making it is concluded by it. The rights secured by the laws of Congress are inconsistent; plaintiff in error could not get a deed for the premises as a town lot and at the same time get a title to it as a mining claim. In the former case the deed depends upon the

non-mineral character of the land which he concedes when he gets it, and in the latter it depends upon the mineral character of the land which he likewise concedes when he gets it. He cannot gamble in this way in courts of law or equity; he made his election, as he had a right to do, and must stand or fall by the result of it. The doctrine here announced, we take it, is sustained by the decisions of the courts and text-writers so uniformly as not to require citations to support it.

Bishop on Contracts, Sec. 808.

Hermann on Est. and Res. Adj., Sec. 1028 et seq., 1162, 1175.

Again the motion for judgment on the pleadings could well be sustained upon this ground, which does not involve a Federal question.

IV.

Is the patent conclusive of the *fact* sought to be inquired into? Whenever the right to a patent exists under any conceivable state of facts and the patent issues, it is conclusive evidence, in so far as the legal title is concerned, that the state of facts authorizing its issuance exists. There is no conflict in the authorities on this point.

The question as to the mineral or non-mineral character of the land is determined by the non-mineral patent issued therefor, and in the absence of fraud on the part of the grantee that would warrant the United States in setting it aside or support the claim of a third party in

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treating the grantee as a trustee, the legal title must prevail. The United States does not seek to set aside the patent, no claim of fraud in the entry and obtaining of the patent is alleged by which plaintiff in error was prevented from contesting his claim so as to make him a beneficiary and the grantee in the patent a trustee for him, and it necessarily follows that the patent title must be upheld. As stated, if the patent could properly issue under any conceivable state of facts, when issued, it is an adjudication by the land department that the necessary state of facts exists. Whenever this is the case the legal title to the property is conveyed by it. Hence, did the patent determine the mineral or non-mineral character of the land is an important question. If it did, defendant has no claim in law or equity to the premises in controversy. Nowhere does the law except a mining claim out of the townsite patent, but it is excepted out of the grant under the Act of Congress, just as it is out of the grant to the Northern Pacific Railroad Company, making the cases analagous, and Barden v. N. P. R. R. Co., supra, is directly in point. The only instance where an exception of this kind exists is in the case of a patent to a placer claim, when lodes are known to exist at the time of the application, which are excepted out of the *patent*. In all other instances, if the right to a patent depended upon a given state of facts it is for the land department to pass upon them and issue or deny the patent. In so far as the reservation in the patent to the probate judge in favor of bona fide rights of miners is concerned,

it has been decided too often by this court and the Supreme Court of the United States that such provision is a nullity to require further comment; that a similar reservation in deeds of the probate judge, who acts as agent of the United States in transferring the title, is affected with the same infirmity, follows as a necessary sequence, goes without saying. The beneficiary receives precisely the same title vested in the trustee. Can a grant to a mineral claim, which has conditions attached to it, imply more than a grant to the N. P. R. R. Co. where mines are excepted from the *operations* of either? The cases are parallel and the Supreme Court has decided that the patent determines the mineral or non-mineral character of the land. It was claimed in the Barden case that notwithstanding mineral lands were excepted out of the operation of the grant, that the location of the definite line of the road carried with it all such lands as were not known to be mineral. The court, however, held that this was not the law, but that there must be some time in this drama of title when the mineral or non-mineral character of the land is determined, and that such determination was had when a patent issued to one or the other of the parties. The burden of the argument of the plaintiff in error from beginning to end is that as mineral lands are excepted out of the town site act the location of plaintiffs in error secured a grant from the government, and that the issuance of the patent to the city was as to that portion void. So it is in the Barden case, by the location of the definite line of the road the

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grant became fixed, yet there was no adjudication as to the character of the land until the patent issued, as upon this question depended the right of a patent to either. The expression of the statute that no mineral lands shall be included in a townsite is no more forcible than that they shall be excluded from the grant. It expresses the law as it exists in all cases, yet there must be some time and some tribunal under our system of government when and where these rights are adjudicated. If A is the real owner of a piece of land and sues B to recover it, the adjudication one way or the other fixes the right, however erroneous it may be. So it is here. The theory of plaintiff in error is that the trial court should determine the question of the rights of the parties which depend upon the mineral or non-mineral character of the land, while defendant in error claims that the land department settles that question by the issuance of the patent; and this is exactly the point settled in the Barden case. The only real question is, which is the proper tribunal to settle it. And so it is, the patent to the city (with the unlawful exception excluded) is a determination that *at the time* it issued the land was not mineral and that for this reason a title could be acquired by it. We might here add that there is no such averment in the answer of the mineral character of the land as would except it out of the townsite patent or grant to the railroad, either upon a trial in this court or the land office. The averment is, "that the claim contains valuable deposits of gold" as will be seen from the record—page 12—while the

law is, that it must be known "to contain such an amount of minerals as to be valuable for mining purposes."

Dower v. Richards, 151 U. S., 658, 662, and cases there cited.

In this case, however, the Court finding as a fact that the claim was non-mineral, the effect of the patent became immaterial and is not discussed. The answer therefore fails to set up facts sufficient to conlstitute a defense; would be bad on general demurrer, and for the same reason warrant a judgment upon general grounds upon the pleadings.

Sweeney v. Schlessinger, 18 Montana, 326, 45 Pac., 213.

We respectfully call the attention of the Court to the able and convincing argument contained in the opinion of the trial judge and the many authorities therein cited in support of it. Indeed it would seem that nothing could well be added to what is there expressed.

The original complaint in this action was for the determination of the title to a certain lot in the City of Helena, in the County of Lewis and Clarke, State of Montana, which had theretofore been embraced in a United States patent of said premises as a part of the townsite of said city, and to remove a cloud from the title of defendant in error on account of a deed obtained by plaintiff in error from the Probate Judge for the same premises. Both parties claim title to the same premises from a common source, and the contention was confined exclu ively

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to the respective titles acquired under the townsite entry. The defendant in error, as against *this* claim of plaintiff in error, asserted a title by adverse possession, and set up such a *state of facts* as in his opinion supported such title. Judgment was rendered by this Court upon the pleadings; the case was appealed and the controlling question was whether or not the statute of limitations obtained against the claim set up by plaintiff in error. The Supreme Court of the State held the statute of limitations to be applicable, and reversed the case upon the sole ground that the *facts pleaded* did not come up to the requirements of the statute in such case. After the case had been properly remitted to this Court, defendant in error obtained leave to file an amended complaint, so as to conform to the law as defined by the Supreme Court, and to this amended complaint plaintiff in error filed his amended answer, which with the foregoing facts presents the questions upon which this motion depends.

The amended complaint alleges that plaintiff's (defendant in error) grantor, Robert S. Hamilton, received a deed from the Probate Judge for the *locus in quo* in controversy; that said grantor conveyed to him on the 7th day of May, 1874, and that under this deed and claim of title, exclusive of any other right, he entered into the actual occupation of the identical premises claimed by defendant (plaintiff in error); had the same continuously enclosed by a good and substantial fence for twenty-four years last past; that such claim, occupation and possession were open, notorious and hostile, and that the claim

of defendant was barred under the provisions of the statute mentioned. It alleges that Hamilton, the grantor of defendant in error, finding an excess of ground in *measurement* but not according to boundaries, applied to the Probate Judge for a deed therefor, and paid for the same on the 20th of August, 1873, and that plaintiff (defendant in error), as his grantee, received a deed therefor, as will appear by paragraphs IV and V in said amended complaint. It also alleges that defendant (plaintiff in error), obtained and procured from said Probate Judge a deed for the premises in controversy in the manner and form as set forth in the original complaint.

The amended answer does not deny the conveyances to plaintiff (defendant in error), and his grantors, nor any of the facts constituting the adverse possession of defendant in error, but takes issue upon the legal conclusions of ownership and possession. It does not deny the issuance of the townsite patent, or the application of Hamilton, plaintiff's (defendant in error) grantor, to enter the lot in question, or the payment therefor to the Probate Judge on the 20th day of August, 1873, or the execution of the deed to the same to plaintiff (defendant in error) as such grantee. It alleges that defendant (plaintiff in error) obtained a deed to said premises from the Probate Judge for the purpose of further assuring his title to the same, and to obtain possession in order to enable him to prosecute the necessary development work, and admits the recordation thereof; that he claims title and does

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not deny that the same casts a cloud upon whatever title plaintiff (defendant in error) has to the premises.

Aside from these conceded facts, defendant (plaintiff in error) for new matter, and for the first time, and by his amended answer filed on the 2d day of October, 1894, asserts a mining right or title to said premises, under an alleged location made prior to the patent for the town-site, and avers that plaintiff (defendant in error) and other occupants refused to permit him to represent his mining claim, and offers no excuse for not instituting an action for said premises during the quarter of a century last past, nor does he assign any reason for not applying to the Court for leave to represent. He does not deny the improvements put upon the premises, the open and notorious occupation and possession of the same by plaintiff, or the recordation of the title papers therefor, all of which will fully appear by reference to the pleadings and proceedings on file herein.

Three material questions were therefor presented by the motion.

First—Is the title acquired by the defendant (plaintiff in error) under his deed from the Probate Judge inferior to the title of plaintiff, (defendant in error) and is said deed a cloud upon the same?

Second—Does the new matter set up in the amended answer constitute a valid defense in this action?

Third—If it does, is it barred by the laches of the defendant (plaintiff in error) under the doctrines of equity in such cases?

We will consider these propositions in the order named.

I.

In so far as the title acquired by the defendant (plaintiff in error) under his deed from the Probate Judge is concerned, the Supreme Court emphatically declared that the statute of limitations obtained, and that if the facts suported an adverse possession in plaintiff (defendant in error) and his grantors during the period, provided by law, his title was superior to the title of defendant (plaintiff in error).

The plaintiff (defendant in error) set up title by adverse possession and pleaded such facts, as in his opinion, constituted such possession. The case was reversed upon the sole ground that the facts pleaded were insufficient, thereby distinctly recognizing that the statute was applicable and controlling. If inapplicable, the Court would have so said, and the case would have rested upon other issues presented by the pleadings.

See 13 Mont. 250.

The principles of law thus announced by the Supreme Court of the State become the *law of the case*, and are conclusive of title in plaintiff, (defendant in error) if the facts legally constituting adverse possession are properly alleged and not denied.

Hermann on Res. & Estop., 117, Sec. 115.

21 Am. & Eng. Enc. of Law, 129, note 1,184-187.

Board v. N. P. R. R., 24 Wis., 123.

Wilson Ex'r. v. Deen, 121 U. S., 525 bottom 532.

Burlen v. Shannon, 99 Mass., 200. (96 Am. Dec., 733.)

Clary v. Hoagland, 6 Cal., 685.

Kile v. Tubbs, 32 Cal., 332.

Table Mt. Co. v. Stranahan, 21 Cal., 548.

Lesse v. Clark, 20 Cal., 387.

Page v. Fowler, 37 Cal., 100.

Anderson et al. v. Fisk et al., 36 Cal., 625.

a. Besides, as to defendant's (plaintiff in error) title to the premises in controversy under his deed from the Probate Judge, both parties derive title from a common source, and neither can dispute the title of their common grantor.

b. He (plaintiff in error) has pleaded a particular title and is limited to it.

Sedgwick & Waite on Trial of Title to Land, 492.

II.

But above all, the new matter set up in the amended answer constitutes no defense. It presents the simple question of *fact* as to the mineral or non-mineral character of the land. If both parties claimed under the grant from the government before the emanation of the patent, this would be an open question, and a proper question for investigation by this Court. As it is, the patent is conclusive of the fact that the land was non-mineral and subject to conveyance as a townsite.

The patent is not assailed for fraud in its procurement, and the issue sought to be tendered is absolutely frivolous.

See authorities heretofore cited, and especially N. P. R. R. Co. v. Barden, 154 U. S., 288.

a. The reservation of mineral rights in the patent has universally been held void by the courts.

Heath v. Wallace, 138 U. S., 584-585.

Francoeur v. Newhouse, 40 Fed., 618.

Dredge v. Forsythe, 2 Black, 363.

We insist that the doctrine is firmly established that so long as the title of the respective parties rests solely upon the grant under the statute, the question sought to be presented is proper, but that the issuance of the patent to either is a conclusive determination of the character of the land and can only be impeached for fraud or mistake.

III.

The claim of plaintiff in error to the premises as a mining claim, after a quarter of century's occupancy by defendant in error and his grantors, through their deeds from the Probate Judge, under the towssite patent, is stale and barred by the laches of plaintiff in error. He has no standing in a court of equity under such circumstances.

Chandler v. Calumet, etc., 149 U. S., 93.

Curtner v. U. S., 149 U. S., 662.

Twin Lick Co. v. Marbury, 91 U. S., 587.

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Badger v. Badger, 2 Wall., 87.

Pratt v. Cal. Mining Co., 9 Sawyer,————

a. Courts of Equity usually follow the statutes of limitation in determining whether a suit is barred by laches.

Curtner v. U. S., 149 U. S., 662 and 93.

b. The actual, open and notorious possession and improvement of the premises by defendant and his grantor was constructive notice to defendant, which makes his laches the more obnoxious and his claim the more reprehensible.

c. The recordation of the deeds carrying a chain of title from the patent down to plaintiff was also continuous and constructive notice for the last twenty years.

d. The question as to whether the premises were mineral and not subject to the townsite patent, or non-mineral and subject to be conveyed by it, was a question of fact, and the issuance of the townsite patent is conclusive in a *court of law* that the premisies were *non-mineral.*

French v. Fyan, 93 U. S., 169.

Steel v. Smelting Co., 106 U. S., 447.

Smelting Co. v. Kemp, 104 U. S., 636.

N. P. R. R. Co. v. Cannon, 54 Fed. Rep., 252.

Shanklin v. McNamara, 87 Cal., 371.

N. P. R. R. Co. v. Barden, U. S., 154 U. S., 288.

e. The patent conveys the legal title, *if under any state of facts* the department had the power to convey such title.

Sherman v. Buic, 93 U. S., 209.

Earhardt v. Hoagaboom, 115 U. S., 67; 2 Howard, 284.

Having thus determined the question by issuing the patent, it *ipso facto* not only constituted a *claim* or *right* but passed the *legal title* to the patentees which was *in esse* at the *time* the *definite* line of the road was fixed.

United States v. Miner, 114 U. S., 238.

Doll v. Meader, 16 Cal., 294-295.

Doolan v. Carr, 125 U. S., 624.

H. & D. R'y v. Whitney, 132 U. S., 357.

Bagnall v. Broderick, 13 Peters (U. S.), 240, 436.

Lee v. Johnson, 116 U. S., 48.

Ferry v. Street, 11 Pac. Rep., 571.

Aurora Hill Co. v. 85 Mining Co., 34 Fed. Rep. 515, 519.

Smythe v. New Orleans, 34 Fed. Rep. 825.

Shepley v. Cowan, 91 U. S., 330.

Wright v. Roseberry, 121 U. S., 488.

Earhardt v. Hogaboom, 115 U. S., 67.

Cowell v. Lammers, 21 Fed. Rep., 205, 206.

Ferry v. Street, 11 Pac. Rep., 571.

Towsley v. Johnson, 13 Wallace, 72.

Meyendorff v. Frohner, 3 Mont., 273.

This is conclusive evidence of legal title.

Green v. Liter, 8 Cranch., 229.

Bagnall v. Broderick, 13 Peters (U. S.,) 436.

f. The patent in such case being conclusive evidence of such facts in a court of law, the title conveyed by it can only be assailed for fraud or mistake in a court of equity. Hence, the remedy of plaintiff in error if any

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is in a court of equity, making the doctrine of laches applicable.

Johnson v. Towsley, 13 Wallace, 72.

Again these facts all appear from the pleadings and can be reached by demurrer, and consequently under our practice by motion for judgment.

Beach Modern Equity Practice, 258-259.

Besides plaintiff in error could never obtain a patent until the title to the premises conveyed by patent to the Probate Judge is set aside.

Davis v. Weibold, 139 U. S., 528.

The power conferred under the Constitution of making primary disposition of the soil can alone do this.

The Act of Congress fixes the title acquired to a town lot by an occupant at the time of the entry of the townsite. The deed to plaintiff in error was based upon that right, and he cannot limit the purpose of effect of it. The power conferred under the Constitution of making primary disposition of the soil can alone do this, and he must abide the consequences of the election he has made. The claims to placer ground and town lot to the same parcel of land are antagonistic claims, and plaintiff in error was put to his election which he would rely upon. The application for and obtaining of a deed for the same parcel as a town lot *ipso facto*, operated as a relinquishment or abandonment of his claim to it as a placer claim.

There is another view of this case which seems to us absolutely conclusively against the plaintiff in error.

The title acquired by grant and patent to a mining claim and to a town lot under the townsite law and mineral land act are emphatically hostile and inconsistent titles, and, as we have seen in Davis v. Wiebold, when a patent once issues for one, a second patent cannot issue to the same land until the former is set aside or cancelled.

We have seen that the first title emanating from a patent issued by the Land Department, when under any conceivable *state of facts*, it could issue, vests the legal title in the grantee, which can only be impeached for fraud or mistake.

Here defendant (plaintiff in error) under the undisputed facts holds a deed from the Probate Judge, the grantee in the United States Patent, which he himself procured. He has made his election as to the title under which he would rely and cannot curtail or extend the operation or effect to be given to a title acquired under the Acts of Congress whereby the public domain is primarily disposed of under the Constitution of the United States.

He cannot assail the title thus acquired by his own acts on account of fraud or mistake; as, under the uathorities, he must do in order to maintain his claim to it as mineral lands.

He cannot assail it now on account of any mistake in law, as it is a well settled principle that where a party occasions such a mistake he cannot himself take advantage of it. He accepted the patent or deed under it.

McGuire v. Tyler, 8 Wallace, 650.

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Hence it is, if his title under the townsite patent is vulnerable, he is not in a situation to avail himself of it and he must stand or fall upon the title thus acquired.

Now let us suppose that there was no infirmity in his title to the premises as a town lot, and that the Probate Judge entered it in trust for him, and that the conveyance made by the Probate Judge to the grantors of defendant in error conveyed no title, and that the statute of limitations did not apply or run in favor of defendant in error, then we find ourselves confronted by the decisions of the Supreme Court in this very action that the statute does obtain, which decision however erroneous it may be, becomes the *law of the case* and controls it throughout all of its subsequent stages and proceedings. The decision of the Supreme Court, however, is clearly right. The title having passed from the government, against which no laches is attributable, and the statute in such case running against the title of the beneficiary, and the entry under the void deed to defendant in error, if void, being sufficient to put the statute in motion, if the facts satisfying the statute exist, a title was acquired, and such a title as would support this action. This is precisely what the Supreme Court decided on the former trial. This principle, thus declared, was made controlling, and the case was reversed for the reason that in the opinion of the Supreme Court the facts constituting the adverse possession under the statute did not appear to exist. Here they are well pleaded and are admitted, and the law thus announced becomes the *law of the case*. On Dec. 11, 1888,

the defendant (plaintiff in error) elected to obtain a title to the *locus in quo* from the United States through the patent to the townsite of the City of Helena, and he must now be regarded as having relinquished and renounced his irreconcilable claim to it as mining ground. The case is not at all analogous to the purchase of outstanding titles, as generally understood as the acquisition of one title, or in other words a non-mineral title defeats the acquisition of a mineral title until the former is set aside.

Ordinarily if A purchased of B and C he obtains both titles, while under the law here he must set aside or impeach the one first obtained before any could be acquired from the other; and under such condition of things he is in pari delicto, cannot impeach for fraud, and is the author of any mistake or error there may be in law, and is not in a situation to take advantage of it. And so it is where a party is not entitled to both, i. e., a mineral and non-mineral title, he must be deemed to have elected, when he obtains either the one or the other. It is binding on the party making it, and he cannot thereafter pursue an inconsistent course, and avail himself of an inconsistent claim. The defendant (plaintiff in error) under the Acts of Congress could assert a claim to either, perhaps, but not to both. It is the intention of the United States, the grantor, to convey under one or the other, and not both. Defendant (plaintiff in error) chose to assert his claim under the grant to the townsite, and it is too late now to assert a claim to it under the mineral act. By his unequivocal action he has elected

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to take a deed under the townsite patent, and the law establishes the consequences of his act. It is not left to implication or uncertainty so as to be controlled *if it could be* by intent, but is express and unequivocal, and as matter of law must be deemed conclusive. The grant was not made to the Probate Judge by the United States nor by the Probate Judge to defendant (plaintiff in error) for the purposes of enabling him to work a mining claim or for any other purpose than that named in the grant, and plaintiff in error cannot take it otherwise. The patent, while in existence, shuts out the question he seeks to litigate.

The right to elect includes also the duty to elect, and imposes all the consequences of an election when it is made. Here it is especially so, as the government cannot issue a patent for the land as mineral, and also for the same land as non-mineral. The defendant (plaintiff in error) shows from his answer that he was an occupant as an inhabitant of the townsite, at the time of the entry, and also held a mining claim upon the same premises. He was therefore in a situation to renounce or abandon his mining claim, and claim and obtain title as non-mineral land under the townsite patent. He has done so, and cannot now obtain a patent for it as mineral land, and there is no title to such lands recognized when a right to a patent ceases.

It will be noted that it is also claimed on the part of defendant in error that whenever a question of *fact* determined the question as to *whom* should receive the

patent, it became the duty of the officers of the land office to determine that fact under proceedings first instituted in the land department; that whenever it issues a patent that it was a judicial determination that the lands were of the character designated by the patent. That the first and only proceeding to obtain a patent was under the townsite laws, and that the issuance of a patent therefor was a determination that the land was non-mineral, and that the patent pased the legal title to the grantee therein, which could only be assailed by direct proceedings or suit in chancery; and that the right to a mining claim before payment for it, or issuance of patent, was a bare possessory claim, subject to be defeated by a failure to comply with the law, and in no sense was it a "fee simple title;" and that this was the character of title here arrayed against the patent, without presenting any grounds in a court of chancery for its impeachment; that it was the policy of the government to settle such facts as to the non-mineral or mineral character of the land by the patent; and that a reservation of a mining right in a non-mineral patent, or a non-mineral right in a mineral patent was for that reason void. Upon these propositions many authorities have been cited, and especially the more recent decisions of the Supreme Court of the United States, which are controlling on these questions. None of the exceptions in grants of homesteads, pre-emptions, townsites, railroads, etc., contain provisions similar to those contained in the entry of placer claims where the grantee by his patent under the statute is deemed to exclude all

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known lodes. But the rule is different where both patents are for mineral lands, and the land office is not called upon to pass on the questions—as it is, when called upon to pass on the mineral and non-mineral character of the land, and the patent on *its face* shows that it is either for one or the other—counsel refers especially to Iron Silver Co. v. Campbell, 135 U. S. supra, and the last case, N. P. R. R. Co. v. Barden, 154 U. S. supra, as conclusive of all these questions.

We again call the attention of the Court to them, and refer to the case of South End. Min'g. v. Tinney, 38 Pac. Rep. 401, et seq.

We respectfully submit that the naked question as to the mineral or non-mineral character of the land is conclusive against the claim of defendant by the non-mineral patent. That his claim, if any he has, can only be enforced in a Court of Chancery by proper averments, and that it is barred by his laches.

Respectfully submitted,

EDWIN W. TOOLE,

Attorney for Defendant in Error.

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MORAN *v.* HORSKY.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 177. Argued and submitted March 12, 1900.—Decided May 21, 1900.

A neglected right, if neglected too long, must be treated as an abandoned right, which no court will enforce.

Whenever the invalidity of a land patent does not appear upon the face of the instrument, or by matters of which the courts will take judicial notice, and the land is apparently within the jurisdiction of the land department as ordinary public land of the United States, then it would seem to be technically more accurate to say that the patent was voidable, not void.

The defence of laches, put in in this case, is the assertion of an independent defence, proceeding upon the concession that there was, under the laws of the United States a prior right, and conceding that, says that the delay in respect to its assertion prevents its present recognition; and the court is of opinion that the decision of the Supreme Court of Montana in this case was based upon an independent non-Federal question, broad enough to sustain its judgment.

THE facts in this case are as follows: On June 15, 1872, a patent was issued to the probate judge of Lewis and Clarke County, Montana Territory, for the townsite of Helena, in trust

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for the benefit of the occupants. In 1874 Joseph Horsky, Jr., the plaintiff below, defendant in error, became by purchases from prior occupants and conveyances from the probate judge the holder of the legal title to certain lots, shown on the plat of the town. He entered into occupation at the date of his purchase, and has been in undisturbed and peaceful possession from that time to the present. Among these lots are two known and described as lots Nos. 19 and 20, in block 37, on the original plat of the townsite. Subsequent surveys disclosed that, measured by the description on the plat and the calls of the deed, there was an extra area of ground 22 feet front by 103 feet deep. When that fact was discovered the grantor of the plaintiff applied to the probate judge for a conveyance of this extra ground, and paid him the requisite price therefor. However, he received no deed at that time, apparently supposing the deeds for lots 19 and 20 would carry the ground; but afterwards, and on December 15, 1888, on application of the plaintiff, and upon the basis of the prior application and the payment of the necessary price, the probate judge made a deed to him of that extra area known and described on a subsequent plat as lot 31, block 37. In 1891 he filed his complaint in the District Court of the First Judicial District of the State of Montana, setting forth these facts, and that the defendant, Patrick Moran, had, on December 11, 1888, obtained from the probate judge a deed for this lot 31, alleging that it was wrongfully obtained, and praying for a decree quieting his title.

The case thus presented was litigated in the state courts for two or three years, passed to the Supreme Court of the State, (13 Mont. 250,) where a decree in favor of the plaintiff was reversed, and finally came on for hearing in the District Court upon the bill of plaintiff, setting forth the facts, as above stated, and an amended answer of the defendant, containing these averments: That on the 2d day of March, 1869, the probate judge of Lewis and Clarke County made an entry of the tract of land for the benefit of the occupants of the townsite of Helena; that prior to the entry of said townsite a certain placer mining claim had been located within the exterior limits of the tract so entered, which included within its boundaries the lot in contro-

versy; that the location had been made pursuant to the laws of the United States, the local laws, and the rules and regulations of the mining district, and all had been done required thereby to make a perfectly valid location of said placer mining claim, and that the title to this mining claim thus located passed to the defendant; that it was a valid and subsisting mining claim at the time of the entry of the land by the probate judge and of the patent to him; that after the entry of the townsite, and prior to 1874, the defendant left the State of Montana, leaving the mining claim in possession of an agent; that during his absence the plaintiff obtained his deeds for the premises referred to, and entered into possession; that when the defendant returned to Montana he found the plaintiff in possession; that he had ever since been, by the action of the plaintiff, prevented from entering upon or working such mining claim; and that in December, 1888, finding that no deed had ever been made to the plaintiff for this portion of the property, he obtained in furtherance and protection of his own title a deed from the probate judge, which was the deed referred to in plaintiff's complaint.

Upon these pleadings a decree was entered by the District Court in favor of the plaintiff, quieting his title to the premises. On appeal to the Supreme Court of the State this decree was affirmed, (21 Mont. 345,) whereupon the case was brought on error to this court.

Mr. Thomas J. Walsh for plaintiff in error. *Mr. Rufus C. Garland* was on his brief.

Mr. Edwin W. Toole for defendant in error submitted on his brief.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

The Supreme Court of the State affirmed the decree of the trial court primarily on the ground of laches. If this be an independent ground, involving no question under the Federal

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statutes, the decision of the Supreme Court must be sustained and the writ of error dismissed. *Eustis* v. *Bolles*, 150 U. S. 361.

Indeed, if the matter of laches can be recognized at all, it is difficult, independently of the question of jurisdiction, to perceive any error in the ruling of the state Supreme Court. One who, having an inchoate right to property, abandons it for fourteen years, permits others to acquire apparent title, and deal with it as theirs, and as though he had no right, does not appeal to the favorable consideration of a court of equity. We need only refer to the many cases decided in this court and elsewhere, that a neglected right, if neglected too long, must be treated as an abandoned right which no court will enforce. See among others *Felix* v. *Patrick*, 145 U. S. 317; *Galliher* v. *Cadwell*, 145 U. S. 368, and cases cited in the opinion. There always comes a time when the best of rights will, by reason of neglect, pass beyond the protecting reach of the hands of equity, and the present case fully illustrates that proposition.

We, therefore, pass to an inquiry whether the question of laches is so intermingled with that of Federal right that the former cannot be considered an independent matter. As this case was disposed of upon bill and answer, we must take the facts to be as they are presented by the pleadings.

At the time of the commencement of the several proceedings referred to in the bill and answer, the entire area of ground compassed within the limits of the townsite of Helena was public land of the United States, subject to be taken under the preemption, homestead, townsite or mineral laws. There was no reservation in behalf of any railroad company, or for military or other purposes. The whole tract was subject to private appropriation. Under those circumstances, the probate judge of the county made an application for an entry of the tract, as a whole, as a townsite. His application was entertained, the entry made, and thereafter a patent issued to him for the entire tract, including the premises in controversy. Apparently, therefore, by the terms of the patent the legal title to this land had passed to the probate judge in trust for the several occupants. But we are referred by counsel to *Deffeback* v. *Hawke*, 115 U. S. 392, 393, in which it was held that a patent under

the townsite act is "inoperative as to all lands known at the time to be valuable for their minerals, or discovered to be such before their occupation and improvement for residences or business under the townsite title;" and this by virtue of the express provisions of the law relating to the disposition of lands for townsites, as follows: "No title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws." Rev. Stat. § 2392.

The ruling in this case was qualified in *Davis's Administrator* v. *Weibold*, 139 U. S. 507, and it was held that the title of a lot owner holding a deed from the probate judge who had entered the lands under the townsite act could not be defeated because after the issue of the patent there was a discovery of minerals and an issue of a patent therefor to the discoverer, the court saying, on p. 524, after referring to some decisions of the land department:

"It would seem from this uniform construction of that department of the government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining States, Federal and state, whose attention has been called to the subject, that the exception of mineral lands from grants in the acts of Congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction."

The allegations of the answer are to the effect that there was a known mining claim, actually located and worked, at the time of the entry and patent of the townsite, and the argument is that the mining claim was excepted from the scope of the townsite patent as completely as though the exception had been in terms named on the face of the instrument and the boundaries claimed described. The probate judge, therefore, never took title, and having none conveyed none to the plaintiff; the title remained in the government, and neither laches nor limitation run against the rights and title of the government. The mining claim existed, and although defendant had

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abandoned it for years, yet as no one had taken steps to relocate it, he had the right to resume possession and continue work in the way of perfecting his title.

In an opinion by a judge of the state District Court, delivered in deciding this case, is an interesting discussion of the difference between a void and voidable patent, and many authorities from this court are quoted. We shall not attempt to refer to all of them, but content ourselves with noticing one or two. In *United States* v. *Schurz*, 102 U. S. 378, it was held that mandamus would lie to compel the delivery of a land patent which had been duly signed, sealed, countersigned and recorded; that by those acts the title had passed to the patentee, and nothing remained but the ministerial duty of delivering the instrument. In that case there was a matter of dispute between the patentee, who had made a homestead entry, and other parties who claimed that the land was within the incorporated limits of the town of Grantsville, and that the entry had been wrongfully sustained. In the course of a very careful opinion by Mr. Justice Miller, it was said (pp. 400, 401):

"It is argued with much plausibility that the relator was not entitled to the land by the laws of the United States, because it was not subject to homestead entry, and that the patent is, therefore, void, and the law will not require the Secretary to do a vain thing by delivering it, which may at the same time embarrass the rights of others in regard to the same land.

"We are not prepared to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one.

"But the distinction between a void and a voidable instrument, though sometimes a very nice one, is still a well recognized distinction on which valuable rights often depend. And the case before us is one to which we think it is clearly applicable. To the officers of the land department, among whom we include the Secretary of the Interior, is confided, as we have already said, the administration of the laws concerning the sale of the public domain. The land in the present case had been surveyed, and, under their control, the land in that district generally had been opened to preëmption, homestead entry and

sale. The question whether any particular tract, belonging to the government, was open to sale, preëmption or homestead right, is in every instance a question of law as applied to the facts for the determination of those officers. Their decision of such question and of conflicting claims to the same land by different parties is judicial in its character.

"It is clear that the right and the duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. When their decision of such a question is finally made and recorded in the shape of the patent, how can it be said that the instrument is absolutely void for such errors as these? If a patent should issue for land in the State of Massachusetts, where the government never had any, it would be absolutely void. If it should issue for land once owned by the government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent. But such is not the case before us. Here the question is whether this land had been withdrawn from the control of the land department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void."

Now, as we have heretofore noticed, the patent in the case before us for the townsite purported to convey the entire tract. On the face of the instrument there was nothing to suggest any exception. While it may be conceded, under the authorities which are referred to, that, in an action at law by a claimant under that patent, the existence of a mining claim at the time of its issue might be shown and be a valid defence to a recovery of so much of the ground as was included within the mining

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claim, and in that view it may perhaps be not inaptly said that the patent was to that extent void. But be this as it may, whenever the invalidity of a patent does not appear upon the face of the instrument, or by matters of which the courts will take judicial notice, and the land is apparently within the jurisdiction of the land department as ordinary public land of the United States, then it would seem to be technically more accurate to say that the patent was voidable and not void. Even in cases where it has been called void the right of the United States to maintain a bill to set aside the patent has been sustained. Thus, in *United States* v. *Stone*, 2 Wall. 525, patents had been issued for certain lands, (which were in fact within the limits of Fort Leavenworth Military Reservation,) and a bill in equity was filed by the United States to set them aside. Mr. Justice Grier, delivering the opinion of the court, sustaining the decree of the Circuit Court in favor of the government, uses this language (pp. 535, 537):

"Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.

"It is contended here, by the counsel for the United States, that the land for which a patent was granted to the appellant was reserved from sale for the use of the government, and, consequently, that the patent is void. And although no fraud is charged in the bill, we have no doubt that such a proceeding in chancery is the proper remedy, and that if the allegations of the bill are supported, that the decree of the court below cancelling the patent should be affirmed.

* * * * * * * *

"We are of opinion, therefore —

"1. That the land claimed by appellant never was within the tract allotted to the Delaware Indians in 1829 and surveyed in 1830.

"2. That it is within the limits of a reservation legally made by the President for military purposes.

"Consequently, the patents issued to the appellants were without authority and void."

Suppose the United States had brought a bill to set aside so much of this townsite patent as included the mining claim referred to, as, under the authority last referred to and many others, it might have done, it would, under the circumstances disclosed, have been a suit in the interest of and for the benefit of the defendant, and in order to enable him to perfect his inchoate title to this mining property. But it is well settled that when the government proceeds to set aside its patent, not for the sake of establishing its own right to the property, but in the interest of some person who has an equitable claim thereto, or to whom the government owes the duty of protecting his interests, it is subjected to the same defences of laches, limitation and want of equity that would attach to a like suit by an individual. *United States* v. *Beebe*, 127 U. S. 338, in which it was said by Mr. Justice Lamar, on page 347:

"When the government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the government designed for the protection of the rights of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by the other party, nor stop the court from examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants.

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"These principles, so far as they relate to general statutes of limitation, the laches of a party and the lapse of time, have been rendered familiar to the legal mind by the oft-repeated enunciation and enforcement of them in the decisions of this court. According to these decisions, courts of equity in general recognize and give effect to the statute of limitations as a defence to an equitable right, when at law it would have been properly pleaded as a bar to a legal right."

See also *United States* v. *Des Moines Navigation & Railway Company*, 142 U. S. 510; *Curtner* v. *United States*, 149 U. S. 662.

Now, if the government, seeking, in order to discharge its duty to the defendant, to avoid so much of the patent as included this mining claim, is bound by the ordinary rules of equity in respect to laches, etc., *a fortiori* is it true that when he is the party to the litigation the same equitable rules are binding on him. The government cannot, when acting for him, avail itself of those principles of law which are designed simply for its own protection, and no more can he, in his own litigation, shelter himself behind those principles. It is a private right which he is relying upon, although a right created under the laws of the United States, and as to this private right he is subjected to the ordinary rules in respect to the enforcement and protection of such a right.

Carothers v. *Mayer*, 164 U. S. 325, is worthy of notice, for in that case, although not under precisely similar circumstances, it was held that a question arising under the statute of limitations as against a title asserted under the Federal law presented no Federal question, and so also as to equitable rights asserted as against an original right under the laws of Congress. See also *The Pittsburgh & Lake Angeline Iron Co.* v. *The Cleveland Iron Mining Company et al.*, *post*, 270.

Neither does this case in any of its aspects come within *Gibson* v. *Chouteau*, 13 Wall. 92. In that case it was held that one who acquired a legal title from the government could not be defeated in respect to that title on the ground that the party in possession had while the title was in the government acquired some equitable rights by possession or otherwise, which might

have been enforced against one who, during all the time, had as an individual held the legal title. In other words, that as no equitable rights could be asserted against the government while it held the legal title, so when it passed the legal title to an individual he acquired all the rights which the government had at the time of the passage of such legal title. So far as that case has any bearing upon this, it tends to support the conclusions of the Supreme Court of the State of Montana, because here at least the apparent legal title passed to the probate judge, and thereafter to the plaintiff, and it was only an equitable and inchoate right which the defendant was trying to assert.

We conclude, therefore, that the defence of laches, which in its nature is a defence conceding the existence of an earlier legal or equitable right, and affirming that the delay in enforcing it is sufficient to deny relief, is the assertion of an independent defence. It proceeds upon the concession that there was under the laws of the United States a prior right, and, conceding that, says that the delay in respect to its assertion prevents its present recognition. For these reasons we are of the opinion that the decision of the Supreme Court of Montana was based upon an independent non-Federal question, one broad enough to sustain its judgment, and the writ of error is

Dismissed.

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